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IN THE

Supreme Court of The United States

OCTOBER TERM, 1968.

No. 1040

NORFOLK MONUMENT COMPANY, INC.,
Petitioner,

vs.

WOODLAWN MEMORIAL GARDENS, INCORPORATED,
ROSEWOOD MEMORIAL PARK, INCORPORATED,
GREENLAWN CEMETERY PARK CORPORATION,
ROOSEVELT MEMORIAL PARK AND CEMETERY CORPORATION,
PRINCESS ANNE MEMORIAL PARK, INCORPORATED,
JAS. H. MATTHEWS & CO. OF VIRGINIA,
and JAS. H. MATTHEWS & CO.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Norfolk Monument Company, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, decided November 14, 1968 (Appendix A) is not officially reported. The memorandum of the United States District Court for the Eastern District of Virginia; Norfolk Division, filed October 3, 1967, sustaining the motions of the respondents to dismiss the Complaint, is not officially reported (Appendix D).

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. 1257(3). The date of the judgment sought to be reviewed was entered November 14, 1968. There has been no order respecting a rehearing, and there has been no order granting an extension of time in which to petition for a writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

I. Whether and when agreement can be found in consciously parallel decisions by competitors to adopt substantially identical exclusionary restrictions with respect to installation and sale of grave markers, contrary to the Sherman Anti-Trust Act, 15 U.S.C.A. Sections 1 and 2.

II. Do the answers to interrogatories, discovery exhibits and affidavits, together with the pleadings, present an issue of fact for jury trial as to the existence of a tacit agreement to limit and destroy the trading opportunities of the petitioner retail monument dealer?

III. Did the record show beyond doubt that the

petitioner can prove no set of facts in support of its claim, which would entitle it to relief under the Sherman Act?

IV. Did dismissal of the Sherman Act claim on the motion for summary judgment violate the admonition from the record of this case that dismissal should be sparingly practiced?

STATUTES INVOLVED

The statutes involved are 15 U.S.C.A., Sections 1 and 2, and Rule 56(c) (e), Federal Rules of Civil Procedure, as amended.

15 U.S.C.A. Section 1, states:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal."

15 U.S.C.A. Section 2, states:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with other person or persons, to monopolize any part of the trade or commerce among the several States, or within foreign nations, shall be deemed guilty of a misdemeanor."

Rule 56(c) states:

> "The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may

serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Rule 56(e) states:

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

STATEMENT OF THE CASE

The District Court granted summary judgment on the sole ground that petitioner failed to present evidence of a conspiracy among the respondents. The Court of Appeals for the Fourth Circuit affirmed in a two-to-one decision, with Judge Craven filing an exhaustive, forceful, persuasive dissent, which dissent petitioner asks this Court to adopt.

The basis for jurisdiction in the District Court was the Sherman Anti-Trust Act, 15 U.S.C.A., Sections 1 and 2.

From the Complaint, discovery depositions of Charlie C. Gregory, President of petitioner, and affidavits opposing summary judgment, appear the following facts material to the consideration of the questions presented. The record is full of examples of insufficiently explained parallel behavior on which a jury could reasonably find an agreement to violate the Sherman Act. Respondents adopt a remarkably uniform practice of charging prohibitive installation fees to permit the use of an outsider's grave marker, and other similar exclusionary rules and regulations, resulting in a concerted action to eliminate or exclude petitioner's trading opportunities. Despite the unskilled nature of the work, all of the memorial parks refuse to permit petitioner to install markers sold by it. All insist the work be done by the cemeteries themselves. None of the memorial parks charges lot owners a separate installation fee in the case of markers purchased from the cemeteries. All of the memorial parks require the payment of an installation fee by petitioner for installing markers purchased from the

petitioner. Although the actual cost of installation amounts to about Three Dollars ($3.00), yet the memorial parks charge petitioner enormous installation fees and the amounts charged are remarkably similar. The fees charged by Rosewood Memorial Park, Incorporated and Princess Anne Memorial Park, Incorporated for installing single and double bronze markers are identical, and fall within a range of Three Dollars ($3.00) for a single size marker of Greenlawn Cemetery Park Corporation. The installation fees charged for a double bronze marker by Rosewood, Woodlawn, Greenlawn and Princess Anne fall within a range of Twenty-One Dollars ($21.00). All of the memorial parks require a specific alloy content in the bronze markers installed, and reserve the right to reject nonconforming markers. The alloy content requirement is the same as markers manufactured by Jas. H. Matthews & Co., and the same as is suggested implicitly in a pamphlet called "Modern Cemeteries," distributed by Matthews to its customers. All of the memorial parks, except Roosevelt, are customers of Matthews. There have been numerous incidents and attempts by Greenlawn, Woodlawn and Princess Anne to dissuade lot owners from purchasing markers from petitioner. Matthews, in its pamphlet, "Modern Cemeteries," suggests a number of practices, which in effect erect competitive barriers to retailers other than the cemeteries themselves. Most of these practices have been adopted by the memorial park respondents as evidenced by affidavits in the record and by the rule books of Rosewood, Princess Anne and Greenlawn. There is evidence of numerous visits to and conferences with the memorial parks by sales representatives of Matthews. This is at least the fourth time Matthews has been

named co-defendant with memorial parks in anti-trust actions attacking the same practices. Each of the previous actions, *Booth* v. *Jas. H. Matthews & Co.,* No. 60-418-Civ. (W.D. Pa. 1963); *Kaeppler* v. *Matthews,* No. 25618-Civ. (E.D. Pa. 1963); and *United States* v. *Jas. H. Matthews & Co.,* No. 16818-Civ. (W.D. 1958), was settled by a consent decree enjoining the specific practices complained of in this case. Such litigation would tend to educate the respondents as to common methods of doing business. The Matthews pamphlet, "Modern Cemeteries," refers expressly to the anti-trust troubles of the memorial park industry.

Respondent Woodlawn sells its double bronze marker at a two hundred percent (200%) mark-up over cost. Petitioner's supplier, Mier, Johan-Wengler, Inc., charges Seventy-six Dollars ($76.00) for a single marker and One Hundred Seventy-two Dollars ($172.00) for a double marker, thus making petitioner's wholesale cost greater than that of Woodlawn. The record contains evidence of petitioner's retail purchases from 1963 through 1966, that petitioner has charged an average price of One Hundred Seventy-five Dollars ($175.00) for single markers and Three Hundred Thirty-eight Dollars ($338.00) for double markers. Petitioner absorbs the installation fees charged by the memorial parks and does not pass same on to the customer. Petitioner is placed at an impossible competitive disadvantage by the enormous installation fees. In order to meet Woodlawn's price, petitioner must suffer a loss for each sale of a single marker to a Woodlawn lot owner of Sixty-one Dollars ($61.00), to-wit: The cost to petitioner is Seventy-six Dollars ($76.00), which added to the installation fee of One

Hundred Seventy-five Dollars ($175.00), totals Two Hundred Fifty-one Dollars ($251.00), whereas the retail sales price is One Hundred Ninety Dollars ($190.00). Petitioner can only make a gross profit of Twenty-eight Dollars ($28.00) on a double marker, to-wit: The marker cost to petitioner is One Hundred Seventy-two Dollars ($172.00), which added to the installation fee of One Hundred Seventy-five Dollars ($175.00), amounts to Three Hundred Forty-seven Dollars ($347.00), whereas the retail sales price is Three Hundred Seventy-five Dollars ($375.00). Woodlawn, however, has a gross profit of slightly less than Two Hundred Fifty Dollars ($250.00) per marker, although its marker is one inch smaller than that offered by petitioner. Thus, a jury could find that the installation-fee practice, together with the other practices of the memorial parks, is calculated to exclude petitioner from the market, resulting in extensive loss of marker sales by petitioner.

A jury could find that the installation fees charged by the memorial parks are not justified by the expense of perpetual care and maintenance. A maintenance form published by Matthews states that "water is the best cleansing agent" for the marker, which will not deteriorate, will not rust, and does not require perpetual care. Ample funds, from the sale of cemetery lots, exist under Virginia law under "endowment trust funds" to maintain the marker.

The record shows evidence that a jury could find the existence of a tacit agreement among the respondents to limit and destroy petitioner's trading opportunities. In addition to parallel behavior on the part

of the memorial park respondents, the record shows a jury could find that the respondents were mutually aware of the others' restrictive practices. There is direct evidence of frequent conferences between the memorial parks and representatives of respondent Matthews. Matthews has had at least four cases of anti-trust actions for identical practices. Matthews' pamphlet, "Modern Cemeteries," refers to the anti-trust problems and contains suggestions to circumvent legal entanglement and could be considered by a jury as joint invitation to participate in a tacit agreement to exclude petitioner from competing with their own retail sales of markers. The owners of Princess Anne and Rosewood Memorial Parks are identical.

ARGUMENT AMPLIFYING THE REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

I. The split decision of the Court of Appeals conflicts with the decisions of this Court in the following cases: *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962); *Interstate Circuit* v. *United States*, 306 U.S. 208, 227, 59 S.Ct. 467, 83 L.Ed. 610, 620 (1939); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951); *Eastern States Retail Lumber Dealers' Ass'n.* v. *U.S.*, 234 U.S. 600, 612, 34 S.Ct. 951, 58 L.Ed. 1490 (1914).

In *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), the Court held that "summary procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading roles, the proof is largely in

the hands of the alleged conspirators, and hostile witnesses thicken the plot."

In *Interstate Circuit* v. *United States,* 306 U.S. 208, 227, 59 S.Ct. 467, 83 L.Ed. 610, 620 (1939), the Court affirmed that in order to make out a case for the jury, it is not essential that the plaintiff establish a prior agreement. "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act (where each competitor knew that cooperation was essential to successful operation of the plan)."

In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951), the Court held that evidence that manufacturers have a unity of purpose or a common design and understanding in fixing wholesalers maximum resale prices justifies the finding of a conspiracy of the manufacturers to violate the Sherman Act.

In *Eastern States Retail Lumber Dealers' Ass'n.* v. *U.S.,* 234 U.S. 700, 612, 34 S.Ct. 951, 58 L.Ed. 1490 (1914), the Court ruled that in order to show a combination or conspiracy with the Sherman Act, no agreement need be shown under which the concerted action is taken, since it is elementary that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done.

Petitioner urges the Court to adopt the analytical dissent of Judge Craven, who wrote: "As I read the

record, it is simply full of examples of insufficiently explained parallel behavior from which a jury could reasonably find an 'agreement' to violate the Sherman Act. Moreover, the remarkable parallelism of conduct might reasonably be traced to sophisticated and subtle invitations extended by manufacturer Matthews to the trade. In evaluating 'motive and intent' I do not think it entirely without significance that manufacturer Matthews is not inexperienced in questions of anti-trust, about which I will have more to say later.

"Defendants have urged upon us that the remarkably uniform practice of charging virtually prohibitive installation fees to permit the use of an outsider's grave marker and the other similar exclusionary rules and regulations are prompted and justified by legitimate business and economic reasons. I shall attempt to demonstrate that a jury might reasonably conclude to the contrary, but before doing so, I should note that if the evidence supports a finding of concerted action to limit or exclude plaintiff's trading opportunities, such group action is a per se violation of the Sherman Act and hence is not subject to the test of reasonableness. . . ."

". . . Thus, a jury could find that the installation-fee practice, together with other practices of the memorial parks, is calculated virtually to exclude plaintiff from the market.

"The memorial parks contend that the installation fees charged are justified by the expenses of perpetual care and maintenance. Unquestionably, I think, a jury could find otherwise. . . ."

"Hence I see no reason why a jury could not reasonably reject defendant's story and find, on the contrary, that the defendant memorial parks insist upon an exorbitant installation fee in order to exclude plaintiff from competing with their own retail sales of markers. Such an inference seems to me strongly supported by evidence that (a) actual installation costs $3 plus unskilled labor of two men for perhaps an hour, (b) the best cleaning agent is plain water and (c) adequate funds for perpetual care are required by law to be derived from lot sale revenues and income from the $25,000 minimum care fund. To insist in the face of such a record that charging plaintiff an installation fee of as much as $175 per marker is so clearly related to expense incurred that no other inference may be drawn seems to me patently absurd. At the very least there is presented a material issue of fact.

"Thus, there is at best only questionable business justification for those parallel practices which tend to the virtual exclusion of plaintiff from the market. Further, I think the record presents an issue of fact for trial over whether the formation of those parallel practices resulted from individual or concerted action.

"Viewing the evidence most favorably to the plaintiff's case, *Poller* v. *Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473 (1962), I think the answers to interrogatories, discovery exhibits and affidavits, together with the pleadings, present an issue of fact for jury trial as to the existence of a tacit agreement to limit and destroy the plaintiff's trading opportunities.

"The evidence recited, supra, shows parallel behavior on the part of the memorial park defendants. That alone is not enough. Turner, *The Definition of Agreement Under the Sherman Act; Conscious Parallelism and Refusals to Deal,* supra, at 658. However, I think the record justifies the inference, and a jury could so find, that the defendants were mutually aware of the others' restrictive practices. Against the background of anti-trust litigation over identical practices (involving the defendant Matthews) such an inference seems clearly permissible. The Matthews pamphlet, 'Modern Cemeteries,' containing, supra, references to anti-trust problems and suggestions to circumvent legal entanglement, could, I think, fairly be characterized as a 'joint invitation' to participate in the tacit agreement here alleged. *Interstate Circuit* v. *United States,* supra. Moreover, as previously noted, the record does contain direct evidence of frequent conferences between the memorial parks and representatives of defendant Matthews, the alleged hub of the conspiracy.

"On facts closely analogous to those presented here, the Third Circuit has said,

> 'Our starting point in analyzing the evidence is the complete unanimity with which all the distributors refused to license features on first run to plaintiff and the substantial unanimity with which they gave the Boulevard (plaintiff's drive-in theater) a 28 day (delayed showing) status. . . . This *uniformity in policy* forms the basis of an inference of joint action.' *Milgram* v. *Loew's, Inc.,* 192 F.2d 579, 583 (3rd Cir. 1951) (emphasis added).

"Thus, in *Milgram,* evidence of conspiracy was found in participation in, or in mere acquiescence in, parallel business practices, even without a showing of invitation and acceptance such as was present in *Interstate Circuit,* id. at 583-84.

"In this case, the defendants' entitlement to summary judgment is rested on testimonial denials of the existence of an agreement, coupled with plaintiff's failure to come forward with direct evidence. 'But in this modern era of increasing subtleties, it is rare indeed for a conspiracy to be proved by direct evidence. There is no dispute over the proposition that circumstantial evidence will sustain a finding of conspiracy.' *Milgram* v. *Loew's, Inc.,* 192 F.2d 579, 583 (3rd Cir. 1951). While a party opposing a motion for summary judgment cannot rest on conclusory allegations, *Robin Construction* v. *United States,* 345 F.2d 610, 614 (3rd Cir. 1965), the burden is upon the movant to establish that no issue of fact remains for trial. *Liberty Leasing Co., Inc.* v. *Hillsun Sales Corp.,* 380 F.2d 1013, 1014 (5th Cir. 1967). The defendants have, in my opinion, failed to come forward with an explanation for their parallel behavior which a reasonable juror could not disregard.

"Where the plaintiff's case necessarily turns on inference, and where it is not 'quite clear what the truth is,' *Poller* v. *Columbia Broadcasting Systems, Inc.,* 368 U.S. at 467, I would, in a conspiracy case, be disinclined to cut off the right to have a jury draw the proper inferences. *Poller* v. *Columbia Broadcasting Systems, Inc.,* supra; *Devex Corp.* v. *Houdaille Industries, Inc.,* 382 F.2d 17 (7th Cir.

1967); *Six Twenty-Nine Productions, Inc.* v. *Rollins Telecasting, Inc.*, 365 F.2d 478, 485 (5th Cir. 1966); *Wurzberg Bros., Inc.* v. *Head Ski Co.*, 276 F. Supp. 142 (D.N.J. 1967). Evidence of conscious parallelism raises fact issues requiring the trial judge to submit the issue of conspiracy to the jury. *Theater Enterprises* v. *Paramount Distrib. Corp.*, 346 U.S. 537, 542 (1954).

"Finally, I think we should not overlook the fact that one of the major evils against which the antitrust acts were designed to guard is the exercise of 'the power arbitrarily to enhance prices. . . .' *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1, 52 (1910). It is partially through the 'private prosecution' of these anti-trust suits that the congressional policy of protection of the public is implemented. I am not so naive as to suppose that mere admission of Norfolk Monument to competition will bring the high prices of grave markers tumbling down. But even a little competition may help—and a little competition can invite more."

In *United States* v. *Container Corporation of America*, 37 L.W. 4077 (decided January 14, 1969), in reversing the dismissal of the complaint charging a price-fixing agreement in violation of Section 1 of the Sherman Act, the Court said: "Inferences are irresistible that the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition . . price is too critical, too sensitive of control to allow it to be used even in an informal manner to restrain competition."

CONCLUSION

Every person will sooner or later die. The memorial park is becoming more and more popular. Each person desires some form of remembrance, as having lived on this earth by way of a marker, or monument. The public is entitled to be protected by competitive prices on markers. The record shows that a jury could find that exorbitant installation fees, together with other practices, has deprived petitioner retail dealer in markers and monuments from competing with the memorial parks, who have acted in concert with the manufacturer Matthews.

It is respectfully submitted that the petition for writ of certiorari should be granted upon the cogent reasons set forth in the dissent of Judge Craven and that the decision of the Court of Appeals for the Fourth Circuit should be reversed with the direction to the District Court to try the case on its merits.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 12,230

Norfolk Monument Company, Inc.,
Appellant,

versus

Woodlawn Memorial Gardens,
Incorporated, et al.,
Appellees.

No. 12,231

Norfolk Monument Company, Inc.
Appellee,

versus

Woodlawn Memorial Gardens, Inc.,
Appellant

No. 12,232

Norfolk Monument Company, Inc.,
Appellee,

versus

Princess Anne Memorial Park,
Incorporated, and Rosewood
Memorial Park, Incorporated
Appellants.

Appeal from the United States District Court for the
Eastern District of Virginia, at Norfolk.
John A. MacKenzie, District Judge.

(Argued June 19, 1968 Decided November 14, 1968).

Before BRYAN, WINTER and CRAVEN, Circuit Judges.

Howard I. Legum (Fine, Fine, Legum & Fine on brief) for Appellants, and Michael E. Bowerman, Bernard Glasser and Robert H. Patterson, Jr., (McGuire, Woods & Battle; Clyde W. Cooper, Jefferson B. Brown and Wm. C. Worthington on brief) for Appellees.

ALBERT V. BRYAN, Circuit Judge:

An antitrust combination and conspiracy, 15 USC 1, 2; 15 and 26, are charged by Norfolk Monument Company, Inc. to certain incorporated cemeteries in the Norfolk, Virginia area and also against the two defendants, Jas. H. Matthews & Co., Pennsylvania and Virginia corporations, respectively parent and subsidiary. The Matthews manufacture and sell bronze grave markers throughout the United States. Complainant is a retailer in Norfolk of burial stones and plaques.

The accusation is that for "many years" prior to the commencement of this suit, December 16, 1965, the defendants by agreement and concerted action have restrained the production, sale and distribution of such items, and have monopolized and attempted to monopolize interstate trade and commerce therein. Upon respondents' motion the suit was dismissed in summary judgment. We affirm.

The inimical conduct ascribed to the defendants in the complaint is this:

> "15. Defendants Matthews, Pennsylvania and Matthews, Virginia have prepared, and the co-conspirators Woodlawn, Rosewood, Greenlawn, Roosevelt and Princess Anne have adopted, various restrictive devices to prevent, restrict and discourage sales of markers by plaintiff for installation in the cemeteries operated by the co-conspirators Woodlawn, Rosewood, Greenlawn, Roosevelt and Princess Anne. These restrictions include, but are not limited to, the following:
>
> "(a) A requirement that all markers installed in the cemeteries operated by the co-conspirators Woodlawn, Rosewood, Greenlawn, Roosevelt and Princess Anne conform to a specific minimum bronze alloy formula, said formula being the identical minimum formula used by defendant Matthews, Pennsylvania in its manufacture of markers;
>
> "(b) A requirement that each marker not purchased from the cemeteries Woodlawn, Rosewood, Greenlawn, Roosevelt and Princess Anne, where the marker is to be installed, be accompanied, at a substantial cost, by a certificate of analysis, prepared by an independent laboratory, attesting to the bronze alloy content of said marker; and

"(c) The assesment of an excessive and unreasonable installation, foundation and an alleged care charge, for all markers not sold by the cemetery where the marker is to be installed, said fee to include amounts substantially in excess of the actual cost of installation.

"(d) By the enactment and keeping in effect by Woodlawn, Rosewood, Greenlawn, Roosevelt and Princess Anne, unreasonable and illegal rules and regulations, which make it virtually impossible for a lot owner to purchase a bronze grave marker from dealers, such as plaintiff;

"(e) By refusing to permit the plaintiff, or any other retail monument dealer, to install grave markers and the foundation therefor in said cemeteries;

"(f) That the excessive and unreasonable charges made by Woodlawn, Rosewood, Greenlawn, Roosevelt and Princess Anne for installation, foundation and alleged care, out of which it exacts an enormous profit, make it virtually impossible for plaintiff to compete in the sale of said markers with said Woodlawn, Rosewood, Greenlawn, Roosevelt and Princess Anne, because plaintiff cannot and does not exact any such charges."

Winnowing the defendants' uncontroverted assertions and plaintiff's concessa from the supporting and counter affidavits, interrogatories and depositions submitted with the motion, the trial judge found that the plaintiff failed to establish the combination or conspiracy, or the effectual or attempted monopolization, it laid to the defendants. His opinion threshes the record very thoroughly and demonstrates that the evidence does not disclose the

presence of these indispensable elements even to the point of tendering a genuine issue thereon. Norfolk Monument Company, Inc. v. Woodlawn Memorial Gardens, Incorporated, et al., ____ FSupp. ____ (E.D.Va. October 3, 1967). We accept this refinement of the proof.

There was simply no direct evidence proffered by the plaintiff of a concert of action amoung the defendants. The only things the cemetery defendants had in common was that they engaged in the operation of cemeteries; each sold burial lots and maintained them; and each sold grave markers or plaques and installed them. No joint activity is disclosed — not even conferences or meetings. The closest evidence to this point was that defendant Matthews' sales representatives frequently visited the cemeteries on business calls. This poverty of proof scarcely made an issue of any kind — certainly none for a jury.

Moreover, the complaint's allegations of conduct and circumstances suggesting a combination and monopoly failed for want of any tender of proof of them. The District Judge found the accusations wholly without foundation. On these points he said in his opinion:

> "Plaintiff's allegations that Matthews would sell only to cemeteries is negated by its own admission that it purchased from Matthews as late as 1965 and terminated such purchases only because it did not like the Matthews product and because Matthews was then a defendant in this suit.
>
> "Plaintiff's allegation that the defendant cemeteries bought only from Matthews was founded apparently on an inspection by the plaintiff's President of these cemeteries which indicated the installation of many of Matthews markers. He admitted, however, that he saw others and had had his company's markers installed therein on occasion. It was further shown that one defendant cemetery had no

Matthews markers at all, that some had as many as fifty percent (50%) of a different brand; and that a composite reading of all of the installations in all of the cemeteries showed at least thirty percent (30%) of a different manufacturer."

Our canvass of the record verifies the dearth of proof in the particulars the District Judge just noted. A principal factor in the plaintiff's contention of his exclusion from competition with the defendants is the cemeteries' regulation prohibiting outsiders from installing markers. The reasonableness of this rule was not weakened by the plaintiff's evidence and is on its face apparent, as the opinion manifests:

"Plaintiff's allegation that it is not allowed to install markers in the defendant cemeteries is admitted by the defendants. Each reserves to itself the right to install all markers, regardless of from whom purchased. In view of the continuing obligation of perpetual care imposed upon the cemeteries, in its contracts with lot owners, in the light of the duty to preserve the cemetery property, all as provided in the cemetery sales agreements made plain to purchasers, such rules and regulations cannot be termed unreasonable. This applies as well to rules setting up specific alloy content as to bronze markers offered for installation and certification thereof."

The chief feature urged as revealing conscious parallels of behavior by the defendant cemeteries — and thus evincing joint and concerted action — is the fee demanded for installing the markers. Of this item the trial court said:

"The allegation that there is a conspiracy to be uncovered in the fact that the charges are made by the

cemeteries for installation of markers, whether such charges be conscionable or unconscionable is not only borne out but is denied in the plaintiff's own proffered exhibits of the different cemetery price scales. These show on their face a wide divergence of prices which would completely negative any systematic scheming or conscious parallelism. Plaintiff agreed that Matthews did not prescribe any charges."

Moreover, the record points out that defendants' installation fees, in addition to being divergent, were arrived at by totally different pricing policies. One charged a flat fee regardless of marker size; while the others charged a fee computed on the square inches of marker surface area; and these fees differed significantly.

The exaction of the fee is accounted for by the memorial parks as embracing not alone the putting of the marker in place and keeping it clean, but also such items as the requisite constant watch over the condition of the markers, the repositioning of them when needed, and replacing them as necessary. The argument that the installation payment was designed solely to discourage plaintiff's sales by increasing the cost of its markers vanishes on consideration. Without it the cemeteries would be required to accept the plaintiff's markers without prospect of financial assistance in the attention to them in the future. No effort was made to show that the contributions to the Virginia statutory trust fund would suffice to provide the moneys necessary for this continued care. At all events, the standard of care may vary in different parks, and the requisite reserve is a matter of good business judgment — surely not a jury issue.

The District Judge, too, altogether justified the utilization of summary judgment for decision although, granted, it should be "sparingly practiced". Poller v. Columbia

Broadcasting System, Inc. 368 US 464, 473 (1962); cf. First National Bank of Arizona v. Cities Service Co., _____ US _____, 36 L.W. 4394 (1968). No prejudice is shown by the plaintiff and a fair dispatch of the case was accomplished.

Affirmed.

CRAVEN, Circuit Judge, dissenting:

Before it can be concluded that there has been a "contract, combination or conspiracy" sufficient to invoke Section 1 of the Sherman Antitrust Act, it must be found that there was an "agreement" (implied or express) between two or more persons or corporations. The issue presented by this appeal, "only glancingly dealt with by courts," is "whether and when agreement can be found in 'consciously parallel' decisions by competitors" to adopt substantially identical exclusionary restrictions with respect to the sale and installation of grave markers.[1]

In *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), the Supreme Court affirmed that in order to make out a case for the jury it is not essential that the plaintiff establish a prior agreement. "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act [where each competitor knew that cooperation was essential to successful operation of the plan]." *Id.* at 227.

Even so, the court affirms the granting of summary judgment despite the warning in *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962), that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." As I read the record, it is simply full of examples of insufficiently explained parallel behavior from which a jury could reasonably find an "agreement" to violate the Sherman Act. Moreover, the remarkable

1. The foregoing is a paraphrased application to this case of the introduction by Professor Turner to his authoritative article: Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962).

parallelism of conduct might reasonably be traced to sophisticated and subtle invitations extended by manufacturer Matthews to the trade. In evaluating "motive and intent" I do not think it entirely without significance that manufacturer Matthews is not inexperienced in questions of antitrust,[2] about which I will have more to say later.

Defendants have urged upon us that the remarkably uniform practice of charging virtually prohibitive installation fees to permit the use of an outsider's grave marker and the other similar exclusionary rules and regulations are prompted and justified by legitimate business and economic reasons. I shall attempt to demonstrate that a jury might reasonably conclude to the contrary, but before doing so, I should note that if the evidence supports a finding of concerted action to limit or exclude plaintiff's trading opportunities, such group action is a *per se* violation of the Sherman Act and hence is not subject to the test of reasonableness.[3] *Radiant Burners v. People Gas Co.*, 364 U.S. 656 (1961); *Fashion Originator's Guild v. Federal Trade Commission*, 312 U.S. 457 (1941).

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2 "[P]ast proclivity . . . to unlawful conduct may be of some significance where the [alleged conspiracy is identical in scope and nature to a previous one]." *Milgram v. Loew's, Inc.*, 192 F.2d 579, 584 (3rd Cir. 1951).

3. "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958). The stock exchange, tobacco warehouses and trade association cases are rightly viewed not as an exception to the rule but as distinguishable because the presumed purpose of group action (generally with some degree of state control) is not to eliminate or exclude competition but, instead, to improve public service. *Silver v. New York Stock Exchange*, 373 U.S. 341 (1962); *Board of Trade of Chicago v. United States*, 246 U.S. 213 (1918); *Asheville Tobacco Board of Trade v. Federal Trade Commission*, 263 F.2d 502 (1959). *See* Oppenheim, Federal Anti-Trust Laws 661 (2d ed. 1959). *4th Cir.*

Since the question is whether or not the case should be submitted to a jury, it can only be answered by a somewhat detailed analysis of what the evidence might be but for the granting of motion for summary judgment. There follows such an appraisal:

THE EXTENT OF PARALLELISM

The record discloses:

(1) Despite the unskilled nature of the work,[4] all of the memorial parks refuse to permit the plaintiff to install markers sold by it; all of them insist that the work be done by the cemeteries themselves.

(2) None of the memorial parks charges lot owners a separate installation fee in the case of markers purchased from the cemeteries.[5]

(3) All of the memorial parks require the payment of an installation fee by the plaintiff for installing markers purchased from the plaintiff. The plaintiff plausibly maintains that the actual cost of installation comes to about $3. Yet, enormous installation fees are charged plaintiff, and there is remarkable similarity in the amounts charged:

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4. It is said by one of the defendants that installation consists of pouring concrete in a prefabricated form, placing the marker in the wet concrete, removing the form after concrete hardens, digging a hole of proper size at the grave site to a depth of five or six inches and laying the marker and foundation in the excavation. Greenlawn's Answer to Interrogatories, Vol. 1, pp. 130, 131. The cost of the mortar is said to be about $3. Affidavit of Charles C. Gregory, Vol. 1, pp. 264-266.

5. Plaintiff's interrogatory #7 states: "[s]tate the amount of installation charge by each of the defendant cemeteries paid by lot owners who purchased the markers directly from the cemeteries of both single and double markers for the years 1960 through 1965." In response to this question, Roosevelt, Woodlawn, Rosewood and Princess Anne stated simply that the installation fee (charged to lot owners who purchase from the cemeteries) was included in the purchase price, without indicating the amount. Greenlawn made the conclusory statement that the fees were the same as charged to the plaintiff.

Fees Charged Plaintiff for Installing
44 x 14 Double Bronze Memorial Plaques

Rosewood	$154.00
Princess Anne	$154.00
Woodlawn	$175.00
Greenlawn	$160.16
Roosevelt	$123.20

Fees Charged Plaintiff for Installing
24 x 14 Single Bronze Memorial Plaques

Rosewood	$ 84.00
Princess Anne	$ 84.00
Woodlawn	$175.00
Greenlawn	$ 87.00
Roosevelt	$ 67.00

Roosevelt caters to a lower-income clientele. In the case of the other four memorial parks, the installation fees charged for 44 x 14 plaques fall within a range of $21. Woodlawn inexplicably charges the same fee for the installation of both sizes of markers. The fees charged by Rosewood, Princess Anne and Greenlawn for 24 x 14 markers fall within a range of $3. There is no evidence in the record explicative of such parallel behavior.

(4) All of the memorial parks require a specific alloy content in the bronze markers installed, and reserve the right to reject non-conforming markers. The alloy content requirement happens to be the same as manufacturer Matthews' markers and the same as is

implicitly suggested in a pamphlet ("Modern Cemeteries") distributed by Matthews to its customers.[6] All of the memorial parks except Roosevelt are customers of Matthews.

(5) There is evidence that Greenlawn,[7] Woodlawn[8] and Princess Anne[9] have attempted to dissuade lot owners from purchasing markers from the plaintiff. The affidavit of plaintiff's president states that numerous other incidents of this nature have occurred.[10]

(6) Defendant Matthews, in its pamphlet "Modern Cemeteries," suggests a number of practices which in effect erect competitive barriers to retailers other than the cemeteries themselves.[11]

(7) Many of these practices have been adopted by the memorial park defendants, as evidenced by affidavits in the record,[12] and by the "rule books" of Rosewood, Princess Anne and Greenlawn.[13]

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6. Matthews is under an injunction prohibiting it from making any suggestions to memorial parks as to the quality of markers installed in the parks. See note 19. However, on page 7 of "Modern Cemeteries," under the heading 'MEMORIALS," Matthews states this fact and then immediately below recites the alloy content of *its* markers. See "Modern Cemeteries" at 7.

7. Affidavit of Mrs. R. W. Garrett, Vol. 1, p. 287.

8. Affidavit of James A. Beasley, Vol. 1, p. 288.

9. Affidavit of Mr. and Mrs. G. C. Brehm, Vol. 1, p. 290.

10. Affidavit of Charlie C. Gregory, Vol. 1, pp. 264, 267-270.

11. "Our attorneys have indicated that any Cemetery would be well advised to notify all lot owners of the conditions in the Rules and Regulations relating to 'MEMORIALS' and the charges for installation and maintenance so that there cannot be allegations by lot owners, that they were not so notified." "Modern Cemeteries," p. 11.

"MEMORIAL RULES AND REGULATIONS"

1. "Oweing to changes made from time to time in the type of memorials permitted in various sections, it is suggested that Owners consult the Cemetery before orders are placed with memorial dealers, in order to comply with rules governing the type permitted in certain sections. Rules governing the erection of memorials are strictly adhered to."

2. "All mausoleums, monuments, memorials, headstones or structures of any kind must be built according to the rules and regulations of the Cemetery."

* * * * * * *

(Cont. page 14)

(8) There is evidence of numerous visits to and conferences with the memorial parks by sales representatives of Matthews.[14]

I notice, also that this is at least the fourth time Matthews has been named co-defendant with memorial parks in antitrust actions attacking the same practices here under scrutiny. Each of the previous actions, *Booth v. Jas. H. Matthews & Co.*, No. 60-418-Civ. (W.D.Pa. 1963), *Kaeppler v. Matthews*, No. 25618-Civ. (E.D.Pa. 1963), and *United States v. Jas. H. Matthews & Co.*, No. 16818-Civ. (W.D.Pa. 1958), was settled by a consent decree enjoining the specific practices here under attack.[15] While no issue of fact

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(Footnote 11 cont. from page 13)

8. "Plans or sketches, with measurements, descriptions and specifications of all stonework or bronze to be placed in the Cemetery, must be submitted to the Management for examination and written approval before a foundation order for the work will be accepted; and in the case of monuments, memorials and mausoleums, detailed specifications must accompany the plans."

* * * *

11. "The Management reserves the exclusive right to reject all work which, on account of design, workmanship, material or faults of any kind, is in its opinion unsatisfactory."

12 "All foundations of any kind shall be installed by the Cemetery, the charges for which shall be reasonable and payable in advance."

* * * *

25. "All monuments, markers and memorials which do not conform to the rules and regulations in sections in which they are placed will be removed."

* * * *

29. "Cleaning of memorials by outside firms is not permitted."

"Modern Cemeteries," pp. 18C, 18D.

12. *See, e.g.*, affidavit of Charlie C. Gregory, Vol. 1, pp. 264-273.

13. Vol. 1, pp. 319, 332, 354.

14. See answers to plaintiff's interrogatories #8 and #9.

15. The decree in *Booth v. Jas. H. Matthews & Co.*, No. 60-418-Civ. (W.D.Pa. 1963), provided in its material respects:

* * * *

"V

"(A) Each of the cemetery defendants is enjoined and restrained from:

(cont. page 15)

was litigated or admitted in these cases, it is not unreasonable to suppose that such litigation is of interest to the trade, and if reported to the trade, would tend to "educate" defendants as to common methods of doing business.

(Footnote 15 cont. from page 14)

"(1) Requiring any person owning a lot or lots in any cemetery owned or controlled by it to purchase any marker from it.

"(2) Refusing to install a marker that complies with the conditions described in this Final Judgment in any section of its cemetery wherein markers are permitted, and refusing to permit the installation of such markers where the cemetery defendant itself declines to make the installation.

"(3) Discriminating between lotowners purchasing markers from it and lotowners purchasing markers from other persons in any or all the following respects:

"(a) the amount of charges for installation or maintenance of a marker;

"(b) the services included in the charges for installation and maintenance of a marker;

"(c) the period of time following delivery of the marker to the cemetery within which it shall be installed.

"(4) Informing its lotowners that markers cannot be purchased for installation in its cemetery from any person other than it."

Named as co-defendants with Matthews in this action were 19 Pennsylvania memorial parks: Forest Lawn Gardens, Inc., Sunset View Memorial Park, Penn-Lincoln Memorial Park, Inc., Rose Lawn Memorial Gardens, Inc., Sunset Hill Memorial Park, William Penn Memorial Park, Restland Memorial Park, Monongahela Valley Memorial Park, Sylvannia Hills Memorial Park, Inc , Allegheny County Memorial Park, Greene County Memorial Cemetery Company, Lafayette Memorial Park Cemetery, Greenwood Memorial Park, Inc., Westmoreland County Memorial Park, Inc , Somerset County Memorial Park, Lakewood Memorial Gardens, Inc., Hollywood Memorial Park, Inc., McKean Memorial Park.

An identical decree was entered against 15 Pennsylvania memorial parks (in both actions Matthews was dismissed as a party-defendant) in *Kaeppler v. Matthews*, No. 25618-Civ. (E.D.Pa. 1963). Enjoined from the practices recited above were the following: George Washington Memorial Park, Inc., Edgewood Memorial Park Company, Glenwood Memorial Gardens, Inc., Philadelphia Memorial Park, Inc., Rolling Green Memorial Park, Inc., Sunset Memorial Park Company, Valley Forge Gardens, Inc., Westminister Gardens Cemetery Company, White Chapel Gardens, Inc., Whitemarsh Memorial Park Cemeteries Company, Inc., Northhampton Memorial Shrine, Inc., Ceder Hill Memorial Park, Inc., Arlington Memorial Park, Forest Hills Memorial Park, Inc., Schuylkill Memorial Park, Inc., Sky-View Memorial Park, Inc.

In *United States v. Jas. H. Matthews & Co.*, No. 16818-Civ. (W.D.Pa. 1958), Matthews was enjoined from the following practices:

* * * * *

"V"

* * * * *

(Cont. page 16)

See Milgram v. Loew's, Inc., 192 F.2d 579, 584 (3rd Cir. 1951). The Matthews' pamphlet, "Modern Cemeteries," makes express reference to the antitrust troubles of the memorial park industry.[16]

(Footnote 15 cont. from page 15)

"(D) Making any suggestion or recommendation for any cemetery the purpose or effect of which is, or may be to eliminate or restrict sales, by any person, of bronze markers for installation in such cemetery.

* * * * *

"VI

"(A) The defendant is enjoined and restrained from, directly or indirectly, selling markers to any cemetery with knowledge that such cemetery:

"(1) reserves to itself the exclusive right to sell markers for installation within its confines; or

"(2) refuses to install bronze markers reasonably appropriate for installation in said cemetery, which are sold by other retail marker dealers;

"(3) has any rule, regulation, or follows any regularly established course of conduct which makes it unreasonably difficult or more costly to have installed within its confines bronze markers sold by persons other than such cemetery.

* * * * *

"VII

The defendant is ordered and directed not later than ten (10) days after the effective date of this Final Judgment:

"(A) To mail a copy of this Final Judgment to each person engaged in selling markers or monuments at retail, who, since January 1, 1954 has purchased, or who, to the knowledge of the defendant, has sought to purchase, markers from the defendant . . . . . "

The record does not indicate whether the defendants in this action received copies of the above-quoted consent decree.

16. See "Modern Cemeteries," pp. 1, 17.

EFFECT OF PARALLELISM

The only record evidence of profit margin enjoyed by the memorial park defendants in marker sales appears in the answer to interrogatories of Woodlawn Memorial Gardens, Inc. The record shows the retail prices charged by all of the memorial parks, but wholesale cost is reflected only as to Woodlawn. Woodlawn's cost and sale price of 44 x 13 double bronze memorial plaques is as follows:

YEAR	*COST*	*SALE PRICE*
1960	$100.00	$300.00
1963	$117.00	$350.00
1966	$125.00	$375.00

Woodlawn's cost and sale price of 24 x 14 single bronze memorial plaques is as follows:

YEAR	*COST*	*SALE PRICE*
1960	$ 56.00	$168.00
1963	$ 59.00	$175.00
1966	$ 63.50	$190.00

Woodlawn's answer to interrogatories indicates that the above-quoted fees include "all perpetual care, installation, and attendant service, together with guaranteed replacement, if necessary." If it can reasonably be inferred, as, infra, I think it can, that these expenses are negligible and/or are funded by an independent source, it would appear that defendant Woodlawn markets it goods at a 200 percent markup over cost.

A discovery exhibit indicates that the plaintiff's supplier, Meierjohan-Wengler, Inc., charges $76 for a 24 x 14 marker and $172 for a 44 x 14 marker, thus making plaintiff's wholesale costs greater than Woodlawn's. The record contains direct evidence of plaintiff's retail prices: a random sample of (record)

invoices dated 1963 through 1966 discloses that plaintiff has charged an average price of $175 for 24 x 14 single markers, and an average price of $338 for 44 x 14 double markers. The installation fee charged by the memorial parks is absorbed by the plaintiff and not passed on to the customer (except as contained in the price charged the customer for the marker). Inferring, as, infra, I think a jury reasonably could, that Woodlawn's overall costs (including perpetual care for the markers) are approximately the same as, or less than, plaintiff's, plaintiff is placed at an impossible competitive disadvantage by the enormous installation fee: in order to meet Woodlawn's price, plaintiff must suffer a loss on each sale of a 24 x 14 marker to a Woodlawn lot owner, *e g* ;

Retail sale price:		$190.00
Marker cost to Plaintiff	$ 76.00	
Installation fee	$175.00	
		$251.00
LOSS		$ 61.00

Moreover, it would appear that plaintiff can make only a gross profit of $38 on a sale of a 44 x 14 marker, *e.g* ,

Retail sale price:		$375.00
Marker cost to Plaintiff	$172.00	
Installation fee	$175.00	
		$347.00
PROFIT		$ 28.00

This is to be contrasted with Woodlawn's apparent gross profit of slightly less than $250 per marker for 1966, and the marker is one inch smaller than that offered by plaintiff.

Woodlawn presents the most extreme case, among the memorial park defendants, of the impact of the installation-fee practice on plaintiff's trading opportunities. But on the

same hypothesis the plaintiff's costs in sale of markers to be installed at all the defendant cemeteries is increased by the amount of the installation fee, from a high of $175 (Woodlawn) to a low of $67 (Roosevelt for 24 x 14 markers). Thus a jury could find that the installation-fee practice, together with other practices of the memorial parks, is calculated virtually to exclude plaintiff from the market.[17]

DEFENDANT'S BUSINESS JUSTIFICATION

The memorial parks contend that the installation fees charged are justified by the expenses of perpetual care and maintenance. Unquestionably, I think, a jury could find otherwise. Of the answers to interrogatories, only Greenlawn's indicates the actual maintenance involved in caring for the markers.[18] Of the answers to interrogatories, only Roosevelt's[19] discloses the portion of the installation fee (paid by plaintiff) allocated to perpetual care of the markers, which it claims is $10. There is no record evidence of actual outlays for marker maintenance. On the other hand, a maintenance form published by Matthews[20] states that "water"

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17. Plaintiff's president testified that Norfolk Monument has suffered extensive loss of marker sales because of the exclusionary practices here under attack. See discovery deposition of Charlie C. Gregory, Vol. III, pp. 59, 77-80.

18. See Vol. 1, pp. 130, 131. Greenlawn indicates that perpetual care for the markers involves only the following:

"1. Cleaning memorial periodically, usually every two to three weeks

"2. Trimming around memorial by hand during the growing season every 10 to 15 days. The type of grasses used are of the fast growing variety (Bermuda or Wild grass) specifically of which would grow completely across a marker in this period of time." *Id.* at 131.

19. Vol. 1. pp. 124, 125.

20. See Vol. 1, pp. 278, 279.

(rainwater?) is the best cleansing agent for the plaques. The discovery deposition of plaintiff's president, Charlie C. Gregory, contains the following testimony:

> (Mr. Gregory) "As far as perpetual care, if the cemetery deliberately goes out there and ruins the marker, then I would not be willing to replace it. But as far as lasting forever, it is of enduring metal. It will not deteriorate. It will not rust. What is perpetual care? No one gives a plaque perpetual care.
>
> "Q Are they polished?
>
> "A No, they are not polished.
>
> "Q Are they grass trimmed?
>
> "A That is maintenance of the cemetery. That is not for the plaque. That is your grass maintenance. The customer pays for that when he buys the lot.
>
> "Q In other words, your testimony would be that there is no such thing as perpetual care of a bronze marker?
>
> "A That is correct, yes, sir. All of the attention it ever needs is a little rain now and then to wash it off, or either a little water to wash it off.
>
> "Q So according to your testimony there would not be any reason for making any provision for perpetual care?
>
> "A That is correct, yes."

If in fact substantial outlays are required for marker maintenance (it seems doubtful on this record), it is clear that apart from installation-fee revenue, ample funds exist to provide for maintenance of the plaques. Each of the memorial parks is required by Virginia statute to maintain an "endowment trust

fund," for perpetual care purposes, of at least $25,000, 8 Code of Virginia § 57-35.2 (1968 Cum. Supp.),[21] and to attribute ten percent of the purchase price of each lot to the trust, 8 Code of Virginia § 57-35.3 (1968 Cum. Supp.).[22] The income from the trust can be devoted only to perpetual care purposes. 8 Code of Virginia § 57-35.8 (1968 Cum. Supp.).[23]

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21. "After June twenty-sixth, nineteen hundred and sixty-four, it shall be unlawful for any person, firm, association or corporation, hereinafter referred to as 'person,' owning, operating or developing any cemetery to sell or offer for sale in this State, either as principal or otherwise, any lot, parcel of land, burial or entombment right in such cemetery, and in connection therewith to represent to the public in any manner, express or implied, that the entire cemetery, a single lot therein, or burial or entombment right therein will be perpetually cared for, unless adequate provision has been made for the endowment care of the cemetery and all lots, burial or entombment rights therein as to which such representation has been made. Each person who shall undertake to develop any such cemetery after June twenty-sixth, nineteen hundred and sixty-four, shall deposit in a bank in this State in an irrevocable endowment trust fund a minimum of twenty-five thousand dollars before the first lot, parcel of land, burial or entombment right has been sold."

22. "Each person owning, operating or developing any such cemetery before or after June twenty-sixth, nineteen hundred and sixty-four shall hereafter deposit in a bank in this State, or in another state, if such person has, prior to June twenty-sixth, nineteen hundred and sixty-four, entered into a trust agreement by which he is required to make at least the minimum deposit required hereunder, a minimum of ten per centum of the selling price of each lot, interment right, and above ground crypts and niches, excluding below ground burial vaults, sold, which amount shall be paid in cash and deposited with the trustee of the care fund not later than thirty days after the close of the month in which payments on the sale are completed."

23. "The income from the endowment care fund shall be used solely and exclusively for the general care, maintenance, administration and embellishment of the cemetery and shall be applied in such manner as the person owning, operating or developing such cemetery may from time to time determine to be for the best interest thereof."

Hence I see no reason why a jury could not reasonably reject defendant's story and find, on the contrary, that the defendant memorial parks insist upon an exorbitant installation fee in order to exclude plaintiff from competing with their own retail sales of markers. Such as inference seems to me strongly supported by evidence that (a) actual installation costs $3 plus unskilled labor of two men for perhaps an hour, (b) the best cleaning agent is plain water and (c) adequate funds for perpetual care are required by law to be derived from lot sale revenues and income from the $25,000 minimum care fund. To insist in the face of such a record that charging plaintiff an installation fee of as much as $175 per marker is so clearly related to expense incurred that no other inference may be drawn seems to me patently absurd. At the very least there is presented a material issue of fact.

Thus, there is at best only questionable business justification for those parallel practices which tend to the virtual exclusion of plaintiff from the market. Further, I think the record presents an issue of fact for trial over whether the formation of those parallel practices resulted from individual or concerted action.

PROOF OF THE CONSPIRACY

Viewing the evidence most favorably to the plaintiff's case, *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473 (1962), I think the answers to interrogatories, discovery exhibits and affidavits, together with the pleadings, present an issue of fact for jury trial as to the existence of a tacit agreement to limit and destroy the plaintiff's trading opportunities.

The evidence recited, *supra*, shows parallel behavior on the part of the memorial park defendants. That alone is not

enough. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, *supra*, at 658. However, I think the record justifies the inference, and a jury could so find, that the defendants were mutually aware of the others' restrictive practices Against the background of antitrust litigation over identical practices[24] (involving the defendant Matthews) such an inference seems clearly permissible. The Matthews pamphlet, "Modern Cemeteries," containing, *supra*, references to antitrust problems and suggestions to circumvent legal entanglement, could, I think, fairly be characterized as a "joint invitation" to participate in the tacit agreement here alleged. *Interstate Circuit v. United States*, *supra*. Moreover, as previously noted, the record does contain direct evidence of frequent conferences between the memorial parks and representatives of defendant Matthews, the alleged hub of the conspiracy.[25]

On facts closely analogous to those presented here, the Third Circuit has said,

> "Our starting point in analyzing the evidence is the complete unanimity with which all the distributors refused to license features on first run to plaintiff and the substantial unanimity with which they gave the Boulevard [plaintiff's drive-in theater] a 28 day [delayed showing] status . . . . This *uniformity in policy* forms the basis of an inference of joint action." *Milgram v. Loew's, Inc.*, 192 F.2d 579, 583 (3rd Cir. 1951) (emphasis added).

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24. See note 15.
25. See note 14 and accompanying text.

Thus, in *Milgram*, evidence of conspiracy was found in participation in, or in mere acquiescence in, parallel business practices, even without a showing of invitation and acceptance such as was present in *Interstate Circuit*. *Id.* at 583-84.

In this case, the defendants' entitlement to summary judgment is rested on testimonial denials of the existence of an agreement, coupled with plaintiff's failure to come forward with direct evidence. "But in this modern era of increasing subtleties, it is rare indeed for a conspiracy to be proved by direct evidence. There is no dispute over the proposition that circumstantial evidence will sustain a finding of conspiracy." *Milgram v. Loew's, Inc.*, 192 F 2d 579, 583 (3rd Cir. 1951). While a party opposing a motion for summary judgment cannot rest on conclusory allegations, *Robin Construction v. United States*, 345 F.2d 610, 614 (3rd Cir. 1965), the burden is upon the movant to establish that no issue of fact remains for trial. *Liberty Leasing Co., Inc. v. Hillsun Sales Corp.*, 380 F.2d 1013, 1014 (5th Cir. 1967) The defendants have, in my opinion, failed to come forward with an explanation for their parallel behavior which a reasonable juror could not disregard.

Where the plaintiff's case necessarily turns on inference, and where it is not "quite clear what the truth is," *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. at 467, I would, in a conspiracy case, be disinclined to cut off the right to have a jury draw the proper inferences. *Poller v. Columbia Broadcasting Systems, Inc., supra; Devex Corp. v. Houdaille Industries, Inc.*, 382 F.2d 17 (7th Cir. 1967); *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478, 485 (5th Cir. 1966); *Wurzberg Bros., Inc. v. Head Ski Co.*, 276 F. Supp. 142 (D.N.J. 1967).

Evidence of conscious parallelism raises fact issues requiring the trial judge to submit the issue of conspiracy to the jury. *Theater Enterprises v. Paramount Distrib. Corp.*, 346 U.S. 537, 542 (1954).

Finally, I think we should not overlook the fact that one of the major evils against which the antitrust acts were designed to guard is the exercise of "the power arbitrarily to enhance prices . . . ." *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 52 (1910). It is partially through the "private prosecution" of these antitrust suits that the congressional policy of protection of the public is implemented. I am not so naive as to suppose that mere admission of Norfolk Monument to competition will bring the high prices of grave markers tumbling down. But even a little competition may help — and a little competition can invite more.

I would affirm the district court as to defendant Jas. H. Matthews & Co. of *Virginia*, which appears to be in the case by error. As to the parent Matthews company and the other defendants, I would reverse and remand for trial by jury.

APPENDIX B

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 12,230

Norfolk Monument Company, Inc.,

Appellant,

vs.

Woodlawn Memorial Gardens, Incorporated;
Rosewood Memorial Park, Incorporated;
et als.,

Appellees.

No. 12,231

Norfolk Monument Company, Inc.,

Appellee,

vs.

Woodlawn Memorial Gardens, Inc.,

Appellant.

No. 12,232

Norfolk Monument Company, Inc.,

Appellee,

vs.

Princess Anne Memorial Park, Incorporated,
and Rosewood Memorial Park, Incorporated,

Appellants.

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk.

Upon the motion of the Norfolk Monument Company, Inc., by its counsel, and for cause shown,

It is ordered that the mandates in the above-entitled cases be, and they are hereby, stayed pending application of the Norfolk Monument Company, Inc., in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application is filed in the said Supreme Court within the time prescribed by law.

/s/ALBERT V. BRYAN
United States Circuit Judge

FILED NOV. 22, 1968
SAMUEL W. PHILLIPS, Clerk.

A True Copy, Teste:
Samuel W. Phillips, Clerk
By Jo Ann C. Kirkpatrick/s/
Deputy Clerk

APPENDIX C

CIVIL ACTION NO. 5331

NORFOLK MONUMENT COMPANY, INC.,
Plaintiff,

v.

WOODLAWN MEMORIAL GARDENS,
INCORPORATED, et al,
Defendants.

ORDER

This action came on the 27th day of September, 1967, to be heard on the Motions for Summary Judgment heretofore filed by the defendant Jas. H. Matthews & Co., Jas. H. Matthews & Co. of Virginia, Greenlawn Cemetery Park Corporation, Princess Anne Memorial Park, Incorporated, Rosewood Memorial Park, Incorporated, and Woodlawn Memorial Gardens, Incorporated; upon the Motions to Dismiss the Plaintiff's action, filed by Greenlawn Cemetery Park Corporation, Princess Anne Memorial Park, Incorporated, Rosewood Memorial Park, Incorporated and Woodlawn Memorial Gardens, Incorporated; and upon the Motion of Woodlawn Memorial Gardens, Incorporated to strike the affidavits filed by the plaintiff in response to the Motions for Summary Judgment.

It is ORDERED that the motions of the several defendants to dismiss the plaintiff's action and the motion of the defendant, Woodlawn Memorial Gardens, Incorporated, to strike the affidavits filed by the plaintiff to be held in abeyance, decisions on said motions being rendered unnecessary by the judgment of the Court on the Motions for

Summary Judgment, to which action of the Court each of the movants object.

The Court having considered the pleadings filed herein, the depositions of the officers of the plaintiff, the interrogatories propounded by the plaintiff and answered by the defendants, the documents produced by the parties pursuant to appropriate motions and orders, the affidavits and briefs submitted in support of and in opposition to the motions, and having considered the argument of counsel, the Court finds, in accordance with its memorandum filed herein on the 3rd day of October, 1967, that no conspiracy or agreement existed between the defendants, or any of them, and that there is no genuine issue as to any material fact and that the defendants are entitled to judgments as a matter of law.

WHEREUPON, it is ORDERED that the defendants' Motions for Summary Judgments are granted and that this cause is dismissed at plaintiff's cost, with prejudice, to which action the plaintiff objects.

JOHN A. MACKENZIE
United States District Judge

Norfolk, Virginia, November 14, 1967.

APPENDIX D

NORFOLK DIVISION

CIVIL ACTION NO. 5331

NORFOLK MONUMENT COMPANY, INC.,
Plaintiff,

v.

WOODLAWN MEMORIAL GARDENS,
INCORPORATED, et al,
Defendants.

MEMORANDUM

The plaintiff, Norfolk Monument Company, is a local retail dealer in cemetery monuments and offers as part of its line, bronze cemetery markers which it sells and also installs.

The defendants are Jas. H. Matthews & Co., a cemetery marker manufacturer and wholesaler, Jas. H. Matthews & Co. of Virginia, a printing material distributor, and four memorial park type cemeteries in the Norfolk, Virginia area, namely, Woodlawn Memorial Gardens, Incorporated, Princess Anne Memorial Park, Incorporated, Rosewood Memorial Park, Incorporated, and Greenlawn Cemetery Park Corporation.

This suit was instituted on December 16, 1965, seeking treble damages and injunctive relief under the Sherman Anti-Trust Act, 15 U. S. C. A., §1 and 2, et seq., and charges that the ". . . said defendants have combined and conspired with the co-conspirators to monopolize, have attempted to monopolize, and have monopolized in aforesaid interstate trade and commerce in the manufacture, sale and distribution of the markers, in violation of Section 2 of the Sherman Act. . . ."

Specifically, the complaint says that the conspiracy is (a) aimed at preventing and restricting the sale of bronze markers in the defendants' cemeteries; (b) that defendants' cemeteries buy all their requirements from Matthews; (c) that markers, to be acceptable for installation in defendants' cemeteries, must be of a specific alloy content; (d) the alloy content of markers must be certificated; (e) defendants' cemeteries have unreasonable and illegal regulations mili-

tating against the sale of plaintiff's markers; (f) each of the defendant cemeteries refuses to allow anyone to install markers in its cemetery except itself; and (g) that the charges of each of the defendants for installation make it impossible for the plaintiff to compete with the sale of markers owned by the defendants' cemeteries, themselves.

Also, the plaintiff charges that the defendants, Matthews, have participated in conspiracy meetings with the defendant cemeteries; that the defendants, Matthews, have provided assistance to the conspiracy practices of the cemeteries; that the defendants, Matthews, have prepared and distributed a copy of rules and regulations containing restrictive material concerning sale of markers, and that there are no grave markers installed in any of the defendants' cemeteries, other than those of Matthews.

To the complaint all of the defendants have filed (1) Motions to Dismiss for lack of jurisdiction in that there is no substantial impairment of Interstate Commerce and in the alternative, (2) Motions for Summary Judgment based upon exhaustive discovery production of documents, affidavits and interrogatories.

In this case the "flow" or "current" of the markers in interstate commerce to the point of installation at the grave site is much more discernible than the vaults in *Lawson* v. *Woodmere, etc.*, 4th Cir. 217 F (2d) 148 (1954). There the vaults were purchased and stored on the cemetery property and resold from stock on hand to a local purchaser for local use. Judge Dobie was inclined, in *Lawson*, to believe that the "flow" of interstate commerce had ceased. Here, however, the bronze markers must be handled by the out of state manufacturer in each individual

sale as the proper inscriptions of name, date of death, etc., are added to each tablet. Under some arrangements, the Matthews Company agrees to a continuing obligation to accept the bronze markers back at a later date to fill in the information as to date of death of a surviving spouse; or, in the case of a "pre-need" sale, to accept the tablets back for proper inscription when bought by the deceased before his death.

The chain of events from the sale of a tablet manufactured in Pennsylvania, to a local cemetery, and resold by the cemetery to a local user, but which resale requires assistance of the Pennsylvania manufacturer in each individual sale as to applicable lettering, and with obligations on the out of state manufacturer to receive the tablet back later from the buyer, through the cemetery, for further inscription and handling, is much more perceptibly in an interstate stream than the vaults in *Lawson*. While the views expressed are unnecessary in light of the ruling hereinafter made on defendants' motions for summary judgment, if called upon to do so, the Court would overrule the Motions to Dismiss for lack of jurisdiction.

But the Motions for Summary Judgment present a different matter entirely. Conceding the necessary interstate commerce involvement to warrant jurisdiction it does not appear that a trial could avail the plaintiff anything.

The plaintiff corporation's principal officer, Mr. C. C. Gregory, has testified exhaustively under appropriate depositions and has been ordered to produce all other evidence tending to prove conspiracy. In answer to specific questions he has admitted that he has no letters, agreements,

correspondence, or any other testimonials to a conspiracy among the several defendants that he has not produced. The evidence he has offered does not show conspiracy.

Plaintiff's allegations that Matthews would sell only to cemeteries is negated by its own admission that it purchased from Matthews as late as 1965 and terminated such purchases only because it did not like the Matthews product and because Matthews was then a defendant in this suit.

Plaintiff's allegation that the defendant cemeteries bought only from Matthews was founded apparently on an inspection by the plaintiff's President of these cemeteries which indicated the installation of many of Matthews markers. He admitted, however, that he saw others and had had his company's markers installed therein on occasion. It was further shown that one defendant cemetery had no Matthews markers at all, that some had as many as fifty percent (50%) of a different brand; and that a composite reading of all of the installations in all of the cemeteries showed at least thirty percent (30%) of a different manufacturer.

Plaintiff's allegaton that it is not allowed to install markers in the defendant cemeteries is admitted by the defendants. Each reserves to itself the right to install all markers, regardless of from whom purchased. In view of the continuing obligation of perpetual care imposed upon the cemeteries, in its contracts with lot owners, in the light of the duty to preserve the cemetery property, all as provided in the cemetery sales agreements made plain to purchasers, such rules and regulations cannot be termed unreasonable. This applies as well to rules setting up specific alloy content as to bronze markers offered for installation and certification thereof.

The allegation that there is a conspiracy to be uncovered in the fact that the charges are made by the cemeteries for installation of markers, whether such charges be conscionable for unconscionable is not only not borne out but is denied in the plaintiff's own proffered exhibits of the different cemetery price scales. These show on their face a wide divergence of prices which would completely negative any systematic scheming or conscious parallelism. Plaintiff agreed that Matthews did not prescribe any charges.

The plaintiff knows of no meetings between the parties; the plaintiff argues that the book "Modern Cemeteries,—Recommendations for their Attorneys" prepared and distributed by Jas. H. Matthews & Co. of Pennsylvania in the interest of management and executives of the Modern Cemetery Industry, admittedly containing many suggestions picked up and inculcated into some of the defendant cemeteries' printed matters, is a hub of the conspiracy. Not so—the booklet itself, an Exhibit, could only be described as a form book. It specifically points out on page 5, that it contains suggested standards of fair and reasonable regulations which the cemetery would be advised to adopt but says that ". . . Jas. H. Matthews & Co. is not permitted to make recommendations and suggests that the reader consult his own attorney."

The plaintiff has been required, under proper appropriate motions, to produce his case. He has said in depositions that he has no evidence other than that proffered. Clearly, the evidence fails to state a case under the Sherman Act.

To put these parties to trial runs full face into the intent and purpose of Rule 56 of the Federal Rules of Civil Procedure. There not only is no genuine issue of

material fact of conspiracy, there simply is no evidence of conspiracy at all and the plaintiff has said he could produce nothing more.

Under the circumstances, the Motion for Summary Judgment filed by each of the defendants will be sustained and will be entered upon receipt of a proper Order prepared by attorneys for the defendants and endorsed by all counsel.

JOHN A. MACKENZIE
United States District Judge

Norfolk, Virginia
October 3, 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1040

NORFOLK MONUMENT COMPANY, INC.,
Petitioner,
vs.
WOODLAWN MEMORIAL GARDENS, INCORPORATED,
ROSEWOOD MEMORIAL PARK, INCORPORATED,
GREENLAWN CEMETERY PARK CORPORATION,
ROOSEVELT MEMORIAL PARK AND CEMETERY CORPORATION,
PRINCESS ANNE MEMORIAL PARK, INCORPORATED,
JAS. H. MATTHEWS & CO. OF VIRGINIA,
and
JAS. H. MATTHEWS & CO.,
Respondents.

BRIEF FOR THE RESPONDENT, ROOSEVELT MEMORIAL PARK AND CEMETERY CORPORATION, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, in which it affirmed the decision of the District

Court, is reported in F.2d and is printed in the Appendix to petitioner's brief at pages 1a-25a. The memorandum opinion of the United States District Court for the Eastern District of Virginia, Norfolk Division, filed October 3, 1967, is reported in 290 F. Supp. 1 and is printed in the Appendix to petitioner's brief at pages 31a-36a. The order granting summary judgment for this respondent, Roosevelt Memorial Park and Cemetery Corporation, filed October 28, 1966, is printed in the Appendix to this brief at pages 14a-15a. The order sustaining the other six respondents' motions for summary judgment, filed November 14, 1967, is printed in the Appendix to petitioner's brief at pages 29a-30a.

JURISDICTION

The petitioner seeks a writ of certiorari under 28 U.S.C.A. 1257 (3) (Appendix to this brief, p. 22a), which relates only to reviews of final judgments rendered by the highest Court of a State. The decision affirming the judgments of the District Court, which petitioner seeks to have reviewed by this Court, was entered by the United States Court of Appeals for the Fourth Circuit, on November 18, 1968. This respondent, therefore, moves this Court to dismiss the petition for writ of certiorari on the ground that the jurisdiction of this Court has not been properly invoked.

THE QUESTION PRESENTED

Petitioner seeks a review and a reversal by this Court of the decision of the Court below which affirmed the judgments of the District Court.

The only question before this Court on this petition is whether there is anything about this case which war-

rants the attention of this Court. Respondent submits that there is not. The Court below correctly affirmed the decision of the District Court in entering summary judgment dismissing petitioner's complaint under Rule 56 (c) (e), *Federal Rules of Civil Procedure,* as amended, because petitioner failed to establish any genuine issue as to any material fact, as to this respondent, after this respondent made and supported its motion for summary judgment as provided by Rule 56 (e), *Federal Rules of Civil Procedure.* Moreover, the Court below correctly affirmed the decision of the District Court in entering summary judgment in favor of the remaining six respondents because petitioner failed to establish a genuine issue of fact as to the existence of a conspiracy or agreement between these respondents, or any of them, after said respondents had properly made and supported their motions.

In sustaining respondents' motions for summary judgment, the District Court held (Appendix to petitioner's brief, pages 35a-36a):

> "The plaintiff has been required, under proper appropriate motions, to produce his case. He has said in depositions that he has no evidence other than that proffered. Clearly, the evidence fails to state a case under the Sherman Act.
>
> "To put these parties to trial runs full face into the intent and purpose of Rule 56 of the Federal Rules of Civil Procedure. There not only is no genuine issue of material fact of conspiracy, there simply is no evidence of conspiracy at all and the plaintiff has said he could produce nothing more."

THE STATUTES INVOLVED

Petitioner alleged violations of the Sherman Act, 15 U.S.C.A., Sections 1 and 2. The pertinent text of those statutes are printed in the Appendix to this brief at page 22a.

The motions for summary judgment were made under Rule 56 of the Federal Rules of Civil Procedure. The text of this Rule is printed in the Appendix to this brief at pages 19a-21a.

Petitioner has attempted to invoke the jurisdiction of this Court under 28 U.S.C.A. 1257(3). The text of this statute is printed in the Appendix to this brief at page 22a.

STATEMENT OF THE CASE

Norfolk Monument Company, Inc., a local retail dealer in cemetery monuments, who also sells bronze cemetery markers, charges this respondent, Roosevelt Memorial Park and Cemetery Corporation, and four other incorporated cemeteries and also Jas. H. Matthews & Co. of Virginia and Jas. H. Matthews & Co., a maker of rubber stamps for stamping corrugated and paper boxes and a manufacturer of bronze memorial plaques, respectively, with an antitrust combination and conspiracy in violation of Sections 1 and 2 of the Sherman Act.

The respondent, Roosevelt, is a Virginia corporation, which owns and operates one small cemetery or memorial park in the City of Chesapeake, Virginia. It sells burial lots in its local cemetery and bronze markers only to its lot owners. Its sale of bronze markers has never in any one fiscal year exceeded $12,000.00. It is a

miniature company in comparison to the size of petitioner.

Petitioner's Complaint, filed December 16, 1965, seeking treble damages and injunctive relief, charges that this respondent has for "many years" prior to the commencement of this suit, by agreement and concerted action with the other respondents, restrained the production, sale, and distribution of grave markers and that the respondents have combined and conspired to monopolize, have attempted to monopolize, and have monopolized interstate trade and commerce therein.

Petitioner's Complaint sets out numerous trade practices which it claimed were in violation of the Sherman Act. However, petitioner's brief to this Court seems to abandon all of these claims as against this respondent. The only specific statement of fact in reference to Roosevelt in petitioner's brief, is that, "All of the memorial parks, except Roosevelt, are customers of Matthews." (page 6, petitioner's brief).

Roosevelt's amended motion for summary judgment (Appendix to this brief, pages 1a-8a) was filed May 3, 1966, and the order granting summary judgment for Roosevelt (Appendix to this brief, page 14a) was entered, "after giving the plaintiff ample opportunity to present all material pertinent to such motion," on October 28, 1966, more than four months before any one of the other respondents filed its motion for summary judgment. Roosevelt's motion for summary judgment was argued before and granted by the Honorable Walter E. Hoffman, United States District Judge; the other respondents' motions were argued before and granted by the Honorable John A. MacKenzie, United States District Judge.

Petitioner's statement on page 5 of its brief that, "The District Court granted summary judgment on the sole ground that petitioner failed to present evidence of a conspiracy among the respondents," is not accurate as far as this respondent is concerned. The District Court granted summary judgment to Roosevelt in accordance with Rule 56, *Federal Rules of Civil Procedure,* as amended, on the ground that it had not been guilty of the offenses charged in the Complaint as a matter of law..

Both trial judges held that petitioner had not set forth specific facts, in accordance with Rule 56, *Federal Rules of Civil Procedure,* as amended, showing that there was a genuine issue for trial. Petitioner now states, in effect, that both trial judges committed reversible error in so holding, and that the Court of Appeals was also in error in affirming each and every one of the respondents' summary judgments. But petitioner does not advance any new or compelling reason why the decision below is wrong. Petitioner does not complain that it needed more discovery. Nothing was withheld from petitioner. All the facts and petitioner's interpretations thereof were before the Courts below. All were rejected as being of no probative value. Petitioner here is merely repeating the conclusions, interpretations, and speculations which were before the Courts below and which were considered and rejected by both.

The District Court had before it Roosevelt's amended motion for summary judgment and amended affidavit of Eugene P. Wadsworth, its president, in support thereof (Appendix to this brief, page 1a) and petitioner's affidavit of Charlie C. Gregory in opposition to amended affidavit of Eugene P. Wadsworth (Appendix to this brief, page 9a). The District Court also had

before it extensive discovery depositions of Charlie C. Gregory, President of Norfolk Monument Company, Inc., taken on June 2, 1966, and further discovery depositions of Charlie C. Gregory taken on July 19, 1966. In addition, the District Court had before it petitioner's interrogatories, and the respondents' answers thereto, numerous exhibits of petitioner introduced at the taking of the aforementioned depositions, and documents filed by respondents in response to petitioner's motion for production. Petitioner's whole case was before the Courts below.

Petitioner has advanced no reason, in accordance with Rule 19 of the *Revised Rules of the Supreme Court of the United States,* why the decision of the District Court, as affirmed by the Court below, should be reviewed. No question is presented which has not been, but should be, decided by this Court. No question is presented which has been decided in a way in conflict with applicable decisions of this Court.

ARGUMENT

Petitioner has advanced no reason why the writ should issue.

A. Petitioner Did Not Meet the Requirements of Rule 56 of the Federal Rules of Civil Procedure, As Amended.

Rules 56 (c) and 56 (e) of the *Federal Rules of Civil Procedure* were amended, January 21, 1963, effective July 1, 1963. The question before this Court is whether the Court below erred in affirming a judgment for Roosevelt under Rule 56. The pertinent parts of Rule 56 state as follows:

> "(c) *Motions and Proceedings Thereon.* The motion shall be served at least 10 days before the

time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. . . .

"(e) *Form of Affidavit; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Rule 56 was amended by this Court for the purpose of effectuating the interest of the rule and to dispose of non-meritorious claims, such as petitioner's, without the necessity for a prolonged trial that could only result in

a judgment for the moving parties. As the Court said in *Seago* v. *North Carolina Theatres,* 42 F.R.D. 627, 633 (E.D.N.C. 1966), affirmed 388 F.2d 987, cert. den. 390 U.S. 959, a civil antitrust action under the Sherman Act, in sustaining defendants' motions for summary judgments:

> "Plaintiff is now required, based upon personal knowledge, to set forth such facts as would be admissible in evidence and show that he is competent to testify with respect to such matters. Rule 56 (e) of the Federal Rules of Civil Procedure was amended to take care of a too rigid standard on motions for summary judgment and to enable the Court, after extensive pre-trial discovery proceedings, to dispose of litigation without the necessity for a protracted trial. This is plainly set forth in the Advisory Committee's Notes with respect to the last two sentences in Rule 56 (e), which constitute the amendment to that section of the rule in 1963. Those notes read, in part, as follows:
>
> > 'The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face

present an issue. In this situation the Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well pleaded," and not suppositions, conclusory, or ultimate.' (citations omitted).

'The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 *Moore's Federal Practice* 2069 (2d Ed. 1953); 3 *Barron and Holtzoff*, supra, #1235.

'It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.' "

The Advisory Committee's Notes have also been given effective force by the Courts in *Markwell* v. *General Tire and Rubber Company*, 367 F.2d 748, 750 (7th Cir. 1966); and *Scarboro* v. *Universal C.I.T. Credit Corporation*, 364 F.2d 10, 15 (5th Cir. 1966). In each case a summary judgment was affirmed.

The express language of Rule 56 (e) required petitioner to go forward with affidavits or as otherwise provided in the rule. Petitioner was required to set forth specific facts on his personal knowledge which would be admissible in evidence, showing that this respondent's affidavit was not true and that there was a genuine issue of fact for trial. Plaintiff was unable to make such a

showing and the District Court held (Appendix to this brief, page 14a):

> "And it appearing from the pleadings together with the amended affidavit of Eugene P. Wadsworth, dated the 3rd day of May, 1966, and the counter-affidavit of Charlie C. Gregory (filed May 25, 1966), that the said defendant, Roosevelt Memorial Park and Cemetery Corporation, has not been guilty of the offenses charged in the Complaint, and that the plaintiff in its opposing affidavit has set forth no specific facts as required by Rule 56 (c) showing that there is a genuine issue for trial, as provided by Rule 56 of the *Federal Rules of Civil Procedure,* to support its conclusory and unsworn allegations, the Court is of the opinion that the defendant, Roosevelt Memorial Park and Cemetery Corporation, is entitled to a judgment as a matter of law."

At no place in petitioner's brief does he come to grips with the question before this Court. He barely mentions Rule 56 and the specific requirements of Rule 56 (e). He has resorted, instead, to a line of antitrust decisions which deal with conspiratorial action and other similar violations of the antitrust laws.

In *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), which petitioner cites on page 9 of its brief, there had been meetings, conferences, contracts, and takeovers between and among the defendants. There is no evidence in the case at bar of any meetings, conferences, contracts, correspondence, or dealings of any nature between this respondent, Roosevelt Memorial Park and Cemetery Corporation, and any of the other alleged conspirator-

defendants. Roosevelt has never purchased grave markers from Matthews or dealt with Matthews in any way. Petitioner's allegation in its affidavit in opposition (Appendix to this brief, page 9a) as to a "take over" of Roosevelt is obviously hearsay as to Roosevelt and totally without merit.

Here, in the case at bar, the District Court found that Roosevelt had not been guilty of the offenses charged in the Complaint and, therefore, was entitled to judgment as a matter of law. The decision of the Court of Appeals does not conflict with the decision in *Poller* v. *Columbia Broadcasting System, Inc.,* supra.

The decision of the Court of Appeals is not in conflict with *Interstate Circuit* v. *United States,* 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939), because in the Interstate case the movie exhibitor-defendants had sent a letter to each of the distributor-defendants, naming all of the distributors as addressees, in which they expressly requested that the distributors comply with certain restrictive practices. The distributors accepted the written proposal by simultaneously imposing identical restrictions. In the case at bar, there is no evidence of any communication between Roosevelt and any of the other defendants. If there is any conspiracy to be found, Roosevelt got no "invitation" and there is no showing that Roosevelt knew anything about it. There is no circumstantial evidence of conspiracy as far as Roosevelt is concerned.

Moreover, Roosevelt has no motive to join any conspiracy with Matthews or the other cemetery defendants. Here, Norfolk Monument Company is unable to point to any benefits to be obtained by Roosevelt in entering

into any agreement with the other defendants. Roosevelt is the only defendant located in the City of Chesapeake, Virginia, and does not serve the same market as the defendant cemeteries. All deceased buried in Roosevelt's cemetery are of the Negroid race, whereas the deceased buried in the other defendant cemeteries are of the Caucasian race. This fact is uncontradicted (See Appendix to this brief, page 7a). In addition, Norfolk Monument Company, Inc., did not and cannot point out any benefits that Roosevelt could obtain in entering into an agreement with Matthews because Roosevelt has never purchased anything from Matthews (See Appendix to this brief, page 6a and petitioner's brief, page 6) and has never been associated with Matthews in any way, other than as a defendant in this case.

Therefore, no logical inference of conspiracy or concerted action would arise as to Roosevelt even if petitioner had set forth admissible evidence probative of uniform charges and operations among the respondents. The evidence of parallel behavior to which petitioner points does not exist in the record or in fact. Even if legally significant evidence of parallel behavior had been produced in accordance with Rule 56 of the Federal Rules of Civil Procedure, only an inference of independent action by Roosevelt would logically follow because Roosevelt has no motive to conspire with any of the other respondents. Petitioner may not rest on his allegations and, therefore, on the facts as shown, summary judgment was correctly awarded to respondent, Roosevelt. *First Nat. Bank* v. *Cities Service Co.,* 391 U. S. 253, 287-288, 20 L.Ed.2d 569, 591-592, 88 S. Ct. 1575, (1968).

In *Kiefer-Stewart Co.* v. *Joseph E. Seagrams & Sons,* 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951) which petitioner cites on page 10 of its brief, there had been conferences and meetings between the defendants concerning sales to plaintiff; and after said meetings, defendants sold to plaintiff's competitors on identical terms as to fixed retail price ceilings, but defendants, by concerted action, had agreed not to sell to plaintiff unless plaintiff agreed to a fixed maximum resale price.

Petitioner states at page 10 of its brief that the Court in *Eastern States Retail Lumber Dealers Ass'n* v. *U.S.,* 234 U.S. 600, 612, 34 S.Ct. 951, 58 L.Ed. 1490 (1914) ruled that:

> "In order to show a combination or conspiracy with the Sherman Act, no agreement need be shown under which the concerted action is taken since it is elementary that conspiracies are seldom capable of proof by direct testimony and may be inferred from things actually done."

This is not what that case ruled. The Court in that case ruled that a conspiracy could be inferred from the concerted action of various defendant lumber associations, composed largely of retail dealers from several states who had expressly associated themselves as members of said associations, in periodically reporting in written bulletins the names of wholesalers who had made sales directly to consumers. In addition, it was the declared purpose of said defendant associations, as disclosed by their constitutions and by-laws, to prevent wholesalers from selling directly to consumers by refusing to buy from them if they did sell directly to consumers.

At no place in its brief or elsewhere does petitioner even claim that the findings of fact and conclusions of the District Court are not supported by the evidence or that the Court needed more evidence. Rather than point to the respects in which the District Court erred, petitioner has resorted to a listing of the aforementioned unrelated and clearly distinguishable anti-trust decisions and has advanced the contention that on the evidence before the Court a jury might conceivably have found for petitioner. Petitioner's unsupported allegations, conjectures, speculations, and generalities will not do in face of the record made in the District Court.

B. Respondent, Roosevelt's Summary Judgment Under Rule 56 (c) (e), Federal Rules of Civil Procedure Was Appropriately Granted.

Summary judgment was appropriately granted to respondent, Roosevelt. Petitioner has evaded the burden upon it to meet the requirements of Rule 56 on Roosevelt's motion. It has not come forth with specific facts based on personal knowledge which would be admissible as evidence tending to prove that Roosevelt became a party to the alleged conspiracy. And as this Court ruled in *Theatre Enterprises, Inc.*, v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 540, 98 L.Ed. 273, 74 S.Ct. 257 (1954):

> "The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from agreement, tacit or express."

Eugene P. Wadsworth, in Roosevelt's amended affidavit (Appendix to this brief, page 5a) attached to its amended motion for summary judgment, said in part that Roosevelt has never refused to install for plaintiff,

or any other marker dealer, grave markers in its cemetery; that Roosevelt has on no occasion adopted or ever, in any way, combined, conspired, or agreed to adopt either directly, or indirectly, expressly or by implication, any restrictive device, regulation, or rule prepared or suggested by any of the defendants for the purpose of preventing, restricting, or discouraging sales of markers by the plaintiff or any other marker dealer for installation in its cemetery. These facts and denials were unopposed and uncontradicted by petitioner's affidavit in opposition (Appendix to this brief, page 9a) or by any other admissible probative evidence.

As the Court said in *Seago* v. *North Carolina Theatres,* supra, 632:

> "The Court agrees in part with the plaintiff in that the affidavits are full of conclusions and general denials, but this does not mean that the defendants' affidavits are to be thrown out and cast aside as these affidavits also state evidential facts as required by Rule 56 (e) of the Federal Rules of Civil Procedure. This Court, therefore, holds and decides that those affidavits were in fact sufficient to cause the plaintiff to go forward with affidavit or other means to show evidentiary facts as required by the Federal Rules. . . . Besides the affidavits presented by defendants, there are also the depositions taken by the plaintiff which do not support his claims but in fact support the contentions of the defendants. Plaintiff must, therefore, go forward and produce evidentiary facts which will in fact support the contentions raised in his voluminous Complaint and briefs. This has not been done."

In the Court below, petitioner's principal argument in regard to Rule 56 seemed to be that an allegation of conspiracy raises a question of fact, or of factual inference, and, therefore, may not be properly disposed of on summary judgment. Petitioner could not be more mistaken if that is his theory here. *First Nat. Bank* v. *Cities Service Co.*, supra.

In affirming all the summary judgments rendered by Judges Hoffman and MacKenzie of the District Court, the Court of Appeals in its majority opinion said (Appendix to petitioner's brief, page 4a):

> "Winnowing the defendants' uncontroverted assertions and plaintiff's contessa [concessions] from the supporting and counter affidavits, interrogatories and depositions submitted with the motion, the trial judge found that the plaintiff failed to establish the combination or conspiracy, or the effectual or attempted monopolization, it laid to the defendants. His opinion threshes the record very thoroughly and demonstrates that the evidence does not disclose the presence of these indispensable elements even to the point of tendering a genuine issue thereon. *Norfolk Monument Company, Inc.*, v. *Woodlawn Memorial Gardens, Incorporated, et al,* 290 F.Supp. 1 (E.D.Va., October 3, 1967). We accept this refinement of the proof.
>
> "There was simply no direct evidence proffered by the plaintiff of a concert of action among the defendants. The only thing that the cemetery defendants had in common was that they engaged in the operation of cemeteries; each sold burial lots and maintained them. No joint activity is

disclosed—not even conferences or meetings. The closest evidence to this point was that defendant Matthews' sales representatives frequently visited the cemeteries on business calls. This poverty of proof scarcely made an issue of any kind—certainly none for a jury."

As the Court said in *Independent Iron Works* v. *United States Steel Corp.*, 322 F.2d 656, 661 (9th Cir. 1963) cert. den. 375 U.S. 922, 11 L.Ed.2d 165, 84 S.Ct. 267:

"Like businesses are generally conducted alike and, as the trial judge correctly stated, similarity in operations lacks probative significance unless present under circumstances which logically suggest joint agreement, as distinguished from individual action."

It should be pointed out here that Roosevelt was never a customer of Matthews and that there is not any evidence that sales representatives frequently visited Roosevelt's cemetery. Roosevelt has never purchased anything from Matthews (petitioner's brief, page 6).

The Court below further said (Appendix to petitioner's brief, page 5a):

"Moreover, the Complaint's allegations of conduct and circumstances suggesting a combination and monopoly failed for want of any tender of proof of them. The District Judge found the accusations wholly without foundation. On these points he said in his opinion:

'Plaintiff's allegations that Matthews would sell only to cemeteries is negated by its own admis-

sion that it purchased from Matthews as late as 1965 and terminated such purchases only because it did not like the Matthews product and because Matthews was then a defendant in this suit.

'Plaintiff's allegation that the defendant cemeteries bought only from Matthews was founded apparently on an inspection by the plaintiff's president of these cemeteries which indicated the installation of many of Matthews markers. He admitted, however, that he saw others and had had his company's markers installed therein on occasion. It was further shown that one defendant cemetery [namely, this respondent, Roosevelt] had no Matthews markers at all, that some had as many as fifty percent (50%) of a different brand; and that a composite reading of all of the installations in all of the cemeteries showed at least thirty percent (30%) of a different manufacturer.'

"Our canvass of the record verifies the dearth of proof in the particulars the District Judge first noted. A principal factor in plaintiff's contention of his exclusion from competition with the defendants is the cemeteries' regulations prohibiting outsiders from installing markers. The reasonableness of this rule was not weakened by the plaintiff's evidence and is on its face apparent, as the opinion manifests:

'Plaintiff's allegation that it is not allowed to install markers in the defendant cemeteries is admitted by the defendants. Each reserves to itself the right to install all markers, regard-

less of from whom purchased. In view of the continuing obligation of perpetual care imposed upon the cemeteries, in its contracts with lot owners, in the light of the duty as provided in the cemetery sales agreements made plain to purchasers, such rules and regulations cannot be termed unreasonable. This applies as well to rules setting up specific alloy content as to bronze markers offered for installation and certification thereof."

The Court below's affirmation is in accord with Judge Dobie's opinion in *Lawson* v. *Woodmere*, 217 F.2d 148, 151 (4th Cir. 1954) wherein he ruled:

"Of necessity the cemeteries have had to reserve the right at all times to adopt reasonable rules and regulations with respect to their maintenance. Every purchaser of a lot has made his purchase upon the understanding that the use of his lot will be subject to reasonable rules and regulations of the cemetery, and his deed contains such a provision. In the light of this duty to preserve the cemetery properties, Woodmere and Ridgelawn, we think, have the right to select the person or persons who shall perform services with respect to their properties and the right to prescribe and enforce the conditions upon which these services shall be performed."

The Court of Appeals below continued, saying (Appendix to petitioner's brief, page 6a):

"The chief feature urged as revealing conscious parallels of behavior by the defendant cemeteries —and thus evincing joint and concerted action—is

the fee demanded for installing the markers. Of this item the trial court said:

> 'The allegation that there is a conspiracy to be uncovered in the fact that the charges are made by the cemeteries for installation of markers, whether such charges be conscionable or unconscionable is not only not borne out but is denied in the plaintiff's own proffered exhibits of the different cemetery price scales. These show on their face a wide divergence of prices which would completely negative any systematic scheming or conscious parallelism. Plaintiff agreed that Matthews did not prescribe any charges.'"

The following are the total prices charged for installation and perpetual care by each of the defendant cemeteries as shown by petitioner's own Exhibit #11 (Vol. III, page 33) which do not reflect a uniformity or similarity of charges:

	Single Marker Installation Charges	Double Marker Installation Charges
Rosewood	$ 84.00	$154.00
Princess Anne	84.00	154.00
Woodlawn	175.00	175.00
Greenlawn	87.36	160.16
Roosevelt	43.60	71.60

In regard to these charges the Court below stated (Appendix to petitioner's brief, page 7a):

> "Moreover, the record points out that defendants' installation fees, in addition to being divergent, were arrived at by totally different pricing policies. One charges a flat fee regardless of size;

while the others charged a fee computed on the square inches of marker surface area; and these fees differed significantly."

Roosevelt charges $ .10 per square inch for installation and $10.00 per marker for perpetual care, or a total of $43.60 for installation and perpetual care of a single marker, as shown by petitioner's own depositions and affidavit in opposition (Vol. II, page 39, and Appendix to this brief, page 11a.)

The charges of the cemeteries vary significantly and none are as low as Roosevelt's. There is no evidence in the record to support Judge Craven's statement of Roosevelt's charges for installation in his dissenting opinion in the Court below as set out in the Appendix to petitioner's brief at page 12a. His erroneous figures were taken from a misstatement in the petitioner's brief to the Court below, and there is not even the slightest bit of evidence anywhere in the record to support them. Even petitioner's own affidavit in opposition shows that Judge Craven's figures are erroneous. (See Appendix to this brief, page 11a.)

Petitioner would have this Court to believe, as stated on page 7 of its brief, that it is placed at a competitive disadvantage by Roosevelt's charges. It is not without significance that the petitioner nowhere in its brief sets out what Roosevelt's installation charges are. Had the petitioner set out the same, it would have disclosed that the petitioner was netting $75.40 on the sale of its single marker at its admitted price of $190.00 and netting $131.40 on its admitted sales price of $375.00 for its double marker, after absorbing Roosevelt's installation and perpetual care charge of $43.60 and $71.60,

respectively, for single and double markers. Therefore, instead of suffering a loss as stated by the petitioner, it is reaping a handsome profit on the sale of each marker it sells for installation in Roosevelt's cemetery.

The Court below went on to say (Appendix to petitioner's brief, page 7a):

> "The exaction of the fee is accounted for by the memorial parks as embracing not alone the putting of the marker in place and keeping it clean, but also such items as the requisite constant watch over the condition of the markers, the repositioning of them when needed, and replacing them as necessary. The argument that the installation payment was designed solely to discourage plaintiff's sales by increasing the cost of its markers vanishes on consideration. Without it the cemeteries would be required to accept the plaintiff's markers without prospect of financial assistance in the attention to them in the future. No effort was made to show that the contributions to the Virginia statutory trust fund would suffice to provide the moneys necessary for this continued care. At all events the standard of care may vary in different parks, and the requisite reserve is a matter of good business judgment—surely not a jury issue."

> "The District Judge, too, altogether justified the utilization of summary judgment for decision although, granted it should be 'sparingly practiced'. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 473 (1962); cf. *First National Bank of Arizona* v. *Cities Service Co.*, U.S. , 36 L. W. 4394 (1968). No prejudice is

shown by the plaintiff and a fair dispatch of the case was accomplished."

Plaintiff has failed to point to any evidence showing that Roosevelt was guilty of any offenses as alleged; moreover, plaintiff has been unable to produce any admissible probative evidence tending to show that Roosevelt had joined or knew of any conspiracy, or that a conspiracy, in fact, existed. Summary judgment is the proper remedy in such a case for no genuine issue of fact can exist without these elements.

> "An issue of fact is not genuine unless it has legal probative force as to a controlling issue." *Rubenstein* v. *Dr. Pepper Company*, 228 F.2d 528, 533 (8th Cir. 1955).

As the Court said in *Lundeen* v. *Cordner*, 356 F.2d 169, 170 (8th Cir. 1966):

> ". . . There is no doubt as to the law. To be entitled to a summary judgment, the moving party must 'adequately support' his motion. A motion is 'adequately supported' if it demonstrates that there are no genuine issues of fact. *Sartor* v. *Arkansas National Gas Corp.*; 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944). In affirming the holding of the trial Court, we went to great lengths to point out why we believed that the affidavits, the exhibits, and the inferences properly drawn therefrom were, indeed, sufficient to support a motion for summary judgment.
>
> "The law is equally clear that when a moving party presents an adequately supported motion for summary judgment (as was done herein) the adverse party must come forward with facts, not

allegations, which controvert the necessary facts set forth in the moving party's case. Rule 56 (e) clearly spells out this duty on the sanction of suffering a summary judgment."

The purpose of the summary judgment rule is to avoid useless trials because of the great waste of time and expense that they cause to the parties as well as the needless inconvenience to the Court. The District Court in the case at bar and also the Court below have stated that no genuine issue of fact exists for a jury.

Roosevelt has no reason to conspire with any respondent herein; no logical inference of conspiracy can be drawn from its conduct and no jury should be allowed to speculate in such a case. Even in a case where consciously parallel business practices have been proven, they are not sufficient evidence, in themselves, from which a jury may infer concerted action. In order for an inference of concerted action or conspiracy to arise from consciously parallel business practices against an accused, it is necessary for the accused to have acted "in apparent contradiction to its own self-interest," for only then is the accused's conduct "inconsistent with decisions independently arrived at." *Milgram* v. *Loew's, Inc.*, 192 F.2d 579, 583 (3rd Cir. 1951). There is not even any legally significant probative evidence of parallel business practices as far as Roosevelt is concerned, much less that of consciously parallel business practices. Moreover, Roosevelt has never acted in contradiction to its own self-interest. Roosevelt has always acted independently. There is no evidence from which a jury should be allowed to draw any inference of conspiracy. The record is completely devoid of any evidence from which a conspiracy could be reasonably inferred.

C. Petitioner Has Not Met Any of the Requirements Essential to a Recovery on a Sherman Act Claim.

In order for petitioner to recover from this respondent, it would be necessary for him to prove that Roosevelt, acting in concert, combined and conspired to injure him in the operation of his monument business, that respondents' acts were the proximate cause of petitioner's injury and that petitioner suffered damages in an ascertainable amount as a result of respondents' acts. Even with all the discovery that petitioner had, he was wholly unable to make any showing that any one of these essential elements were present on respondents' motions for summary judgment. The Court must enter summary judgment upon motion, if there is nothing for a jury to decide.

As the Court said in *Seago* v. *North Carolina Theatres, Inc.*, supra, 639:

> "If the evidence construed most favorable in behalf of the plaintiff would justify or require a directed verdict against him, the Court should enter summary judgment for the defendants. *Dulansky* v. *Iowa-Illinois Gas and Electric Co.*, 10 F.R.D. 566 (S.D. Iowa 1950), *Dewey* v. *Clark*, 86 U.S. App. D.C. 137, 180 F.2d 766 (1950). A popular formula is that summary judgment should be granted on the same kind of showing as would permit direction of a verdict were the case to be tried. *Sartor* v. *Arkansas Natural Gas Corporation*, 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944). The theory underlying a motion for summary judgment is substantially the same as that underlying a motion for directed verdict. The essence of both motions is that there is

no genuine issue of material fact to be resolved by the trier of facts. . . ."

The Court's conclusion in *Seago* v. *North Carolina Theatres, Inc.*, Id., 640, is also suitable here:

> "Plaintiff has not offered any evidence of a common plan, scheme or design among the alleged conspirators. He has not offered any evidence which would allow him to prove conspiracy by similarity of conduct in that the record does not disclose evidence of a mutual awareness of action or conscious parallelism.
>
> "The plaintiff has presented a very forceful case in his Complaint, but he has been unable to support his allegations by evidentiary facts as he must do to resist the motion for summary judgment. Plaintiff has used many of the stock phrases which have been identified with this type of action, but when the Court examines that part of his contentions which remain after disregarding that which is legally insufficient or mere surplusage, it becomes clear that his claim is without substance."

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the petition for certiorari should be denied. There is no issue in this case which warrants the attention of this Court. The petition presents no question of law which has been decided in a way in conflict with applicable decisions of this Court. The petition presents no question of law which has not been, but should be settled by this Court. The jurisdiction of this Court has not been properly invoked.

Respectfully submitted,

BERNARD GLASSER,
Counsel for Roosevelt Memorial
Park and Cemetery Corporation

STUART D. GLASSER
GLASSER AND GLASSER
504 Plaza One
Norfolk Virginia 23510

UNITED STATES: IN THE DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK MONUMENT COMPANY, INC.,	)	
Plaintiff,	)	Civil Action
vs.	)	File
	)	No. 5331
WOODLAWN MEMORIAL GARDENS, INCORPORATED, ET ALS,	)	
Defendants.	)	

AMENDED MOTION

The defendant, Roosevelt Memorial Park and Cemetery Corporation, moves the Court to dismiss the Complaint for failure of the plaintiff to state a cause of action upon which relief could be granted; or, in the alternative, to award to the defendant, Roosevelt Memorial Park and Cemetery Corporation, a summary judgment upon said cause of action.

(1) The defendant avers that the Complaint fails to set out with particularity that the defendant interfered with or damaged any property rights of the plaintiff.

(2) The defendant avers that there is no allegation of public injury or harmful effect to the public interest.

(3) The defendant avers that the acts charged are incapable of constituting a violation of Sections 1 and 2

of the Sherman Act and, therefore, fail to state a cause of action.

(4) The defendant, Roosevelt Memorial Park and Cemetery Corporation, avers that the alleged offenses in violation of Section 1 of the Sherman Act charged by plaintiff in its Complaint are contrary to fact and totally without merit. The defendant, Roosevelt Memorial Park and Cemetery Corporation, has on no occasion ever, in any way, combined, conspired, or agreed, directly or indirectly, expressly or by implication, with either Jas. H. Matthews and Co. of Pennsylvania, or Jas. H. Matthews and Co. of Virginia, or any of the alleged co-conspirators, Woodlawn Memorial Gardens, Incorporated, Rosewood Memorial Park, Incorporated, Greenlawn Cemetery Park Corporation, or Princess Anne Memorial Park, Incorporated, to restrain the sale and distribution of burial markers in violation of Section 1 of the Sherman Act. The defendant, Roosevelt Memorial Park and Cemetery Corporation, further avers that it has on no occasion ever purchased or had purchased any marker from Jas. H. Matthews and Co. of Pennsylvania, or Jas. H. Matthews and Co. of Virginia.

(5) The defendant, Roosevelt Memorial Park and Cemetery Corporation, avers that the alleged offenses in violation of Section 2 of the Sherman Act charged by the plaintiff in its Complaint are contrary to fact and totally without merit. The defendant, Roosevelt Memorial Park and Cemetery Corporation, has on no occasion ever combined, conspired, or in any way agreed, directly or indirectly, expressly or by implication, with either Jas H. Matthews and Co. of Pennsylvania, or Jas. H. Matthews and Co. of Virginia, or any of the

alleged co-conspirators, Woodlawn, Rosewood, Greenlawn, or Princess Anne, to monopolize or to attempt to monopolize interstate trade or commerce in the manufacture, sale, or distribution of burial markers in violation of Section 2 of the Sherman Act. The defendant further avers that it has on recent occasion, and on numerous other prior occasions, installed burial markers sold by the plaintiff, and that it has never refused the plaintiff or any other monument dealer to install grave markers in its cemetery, although not obligated to do so.

(6) The defendant, Roosevelt Memorial Park and Cemetery Corporation, avers that since its inception and without interruption it has operated solely and independently and not in concert with any other concern as a local memorial park and that its activities are clearly and intensely local and fall without the ambit of the Sherman Anti-Trust Act (see *Lawson* v. *Woodmere*, 217 F. 2d 148).

(7) The defendant, Roosevelt Memorial Park and Cemetery Corporation, avers that since its inception and without interruption it has operated solely and independently and not in concert with any other concern as a local memorial park, whose principal clientel is of the Negroid race, and that it has had no occasion in any way to conspire, combine, agree, or have any dealings whatsoever with the alleged conspirators, Woodlawn, Rosewood, Greenlawn, or Princess Anne, whose clientel is principally of the Caucasian race.

WHEREFORE, for the reasons set out above, and on the affidavits filed herewith, the defendant moves the Court to enter an Order dismissing the Complaint

and awarding to the defendant reasonable attorney's fees in defense of this spurious litigation.

ROOSEVELT MEMORIAL PARK
AND CEMETERY CORPORATION

/s/By Bernard Glasser
Counsel

Bernard Glasser, p.d.
504 Plaza One
Norfolk 10, Virginia

I certify that a copy of the foregoing Amended Motion was sent to the following: Fine, Fine, Legum, Schwan & Fine, Law Building, Norfolk, Virginia, counsel for the plaintiff, Norfolk Monument Company, Inc.; Cooper, Spong & Davis, 403 Court Street, Portsmouth, Virginia, counsel for the defendant, Greenlawn Cemetery Park Corporation; Kellam & Kellam, Board of Trade Building, Norfolk, Virginia, counsel for the defendant, Woodlawn Memorial Gardens, Incorporated; and Worthington, White & Harper, Plaza One, Norfolk, Virginia, counsel for the defendants, Rosewood Memorial Park, Incorporated, and Princess Anne Memorial Park, Incorporated, and Robert H. Patterson, Jr., Mutual Building, Richmond, Virginia, counsel for Jas. H. Matthews & Co. of Penn. and Virginia.

/s/Bernard Glasser

5/3/66

UNITED STATES: IN THE DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK MONUMENT COMPANY, INC.,	)	
Plaintiff,	)	
	)	Civil Action
vs.	)	File
	)	No. 5331
WOODLAWN MEMORIAL GARDENS, INCORPORATED, ET ALS,	)	
Defendants.	)	

AMENDED AFFIDAVIT

THIS DAY came Eugene P. Wadsworth, who being first duly sworn, doth depose and say that he is President and Director of Roosevelt Memorial Park and Cemetery Corporation, one of the defendants named in the foregoing complaint, and doth depose and say the following:

(1) That neither Roosevelt Memorial Park and Cemetery Corporation, nor any of its officers, directors, employees, or authorized agents have ever, in any way, conspired, combined, or agreed, either directly, or indirectly, expressly or by implication, with Jas. H. Matthews and Co. of Pennsylvania or Jas. H. Matthews and Co. of Virginia to purchase, or have purchased, bronze grave markers from the said Matthews of Pennsylvania or Virginia, for sale or installation in its cemetery; nor has Roosevelt Memorial Park and Cemetery Corpora-

tion, or any of its constituents aforementioned, ever performed any act, or made any statement, directly or indirectly, expressly or by implication, in furtherance of any such alleged conspiracy, combination, or agreement to in any way prevent, restrict, or discourage sales of markers by the plaintiff dealer, nor has Roosevelt Memorial Park and Cemetery Corporation, or any of its authorized constituents aforementioned ever performed any act, or expressed, either directly or by implication, any desire or intention to restrain or monopolize the interstate or intrastate trade or commerce in the manufacture, price, sale or distribution of any burial markers.

(2) That neither Roosevelt Memorial Park and Cemetery Corporation, nor any of its officers, directors, employees, or authorized agents have, in fact, ever purchased any bronze burial markers whatsoever, either directly or indirectly, from Jas. H. Matthews and Co. of Pennsylvania or Jas. H. Matthews and Co. of Virginia.

(3) That neither Roosevelt Memorial Park and Cemetery Corporation, nor any of its officers, directors, employees, or authorized agents have ever, in any way, conspired, combined, or agreed with any of the alleged co-conspirators, Woodlawn Memorial Gardens, Incorporated, Rosewood Memorial Park, Incorporated, Greenlawn Cemetery Park Corporation, Princess Anne Memorial Park, Incorporated, or any of their respective officers, directors, employees, or authorized agents, either directly or indirectly, expressly or by implication, to in any way restrain, monopolize, or even attempt to monopolize the interstate or intrastate trade or commerce in the manufacture, price, sale, or distribution of any burial markers, either those of Jas. H. Matthews and Co. of Pennsylvania or those of Jas. H. Matthews

and Co. of Virginia, or, in fact, those of any other manufacturer, distributor, or dealer.

(4) That Roosevelt Memorial Park and Cemetery Corporation has since its inception, and without interruption, operated solely and independently and not in concert with any other concern as a local memorial park, and has on no occasion adopted, or ever in any way conspired, combined, or agreed to adopt, either directly or indirectly, expressly or by implication, any restrictive device, regulation, or rule prepared or suggested by Matthews of Pennsylvania and Matthews of Virginia, or any of the alleged co-conspirators, Woodlawn Memorial Gardens, Incorporated, Rosewood Memorial Park, Incorporated, Greenlawn Cemetery Park Corporation, or Princess Anne Memorial Park, Incorporated, for the purpose of preventing, restricting, or discouraging sales of markers by the plaintiff or any other marker dealer for installation in its cemetery.

(5) That Roosevelt Memorial Park and Cemetery Corporation has, since its inception and without interruption, operated solely and independently and not in concert with any other concern as a local cemetery and/or memorial park, whose principal clientel is of the Negro race, and has had no occasion to conspire, combine, agree, or in any way deal with the alleged co-conspirators, Woodlawn, Rosewood, Greenlawn, or Princess Anne, whose clientel is principally of the Caucasian race.

(6) That Roosevelt Memorial Park and Cemetery Corporation has, since its inception and without interruption, never refused to install for the plaintiff or any other marker dealer grave markers in its cemetery; and,

:rk and Cemetery Corpo-
: on numerous other occa-
ld by the plaintiff in its

on the aforementioned,
l Cemetery Corporation
nents in the Complaint
Sections 1 and 2 of the
without evidence to sup-

NE P. WADSWORTH

l before me this 3rd day

CHARD S. GLASSER
otary Public

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IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Norfolk Division

NORFOLK MONUMENT COMPANY, INC., — Civil Action No. 5331

Plaintiff

v.

WOODLAWN MEMORIAL GARDENS, INCORPORATED, et al,

Defendants

AFFIDAVIT OF CHARLIE C. GREGORY IN OPPOSITION TO AMENDED AFFIDAVIT OF EUGENE P. WADSWORTH

STATE OF VIRGINIA,
CITY OF NORFOLK, to-wit:

This day personally appeared before me, Nancy M. Brown, a Notary Public in and for the City and State aforesaid, whose commission expires on the 21st day of November, 1967, Charlie C. Gregory, the undersigned, who being first duly sworn, doth depose and say that he is President of Norfolk Monument Company, Inc., the plaintiff, and does depose and say the following:

1. That he learned from Mr. Charles Castle, formerly General Manager of Rosewood Memorial Park, Incorporated, that in the spring and summer of 1965, officials of Rosewood Memorial Park, Incorporated met

with officials of Roosevelt Memorial Park and Cemetery Corporation, and, among other matters, it was contemplated that Rosewood Memorial Park, Incorporated would take over the operation of Roosevelt Memorial Park and Cemetery Corporation.

2. That under date of May 20, 1964, plaintiff received from counsel for Roosevelt Memorial Park and Cemetery Corporation a letter as follows:

> "I represent Roosevelt Memorial Park and Cemetery Corporation, who has advised that you are selling bronze markers to be installed in its cemetery on Dozier Corner Road in the City of Chesapeake, Virginia.
>
> "In accordance with the by-laws, rules, and regulations of the cemetery, all such markers must meet the standards set by the cemetery and be approved by them. In addition thereto, there is a charge of ten cents per square inch for the installation and maintenance for such bronze markers installed and a required payment of $10.00 per marker for purpetual care.
>
> "This information is being forwarded to you so that your company might be fully advised as to the rules and regulations of this cemetery purtaining to bronze markers."

3. That Roosevelt Memorial Park and Cemetery Corporation, like the other defendants, will not permit this plaintiff, or any other monument dealers to install bronze markers in its cemetery. In addition, the prices charged by Roosevelt Memorial Park and Cemetery

Corporation for installation are excessive. Roosevelt charges $43.60 for installation of a single and $71.60 for a double bronze marker, whereas the plaintiff could install the same for no more than $5.00.

4. In addition, according to information supplied by the owner of Hairston's Funeral Home of Virginia Beach, Virginia, Roosevelt Memorial Park and Cemetery Corporation only charges Hairston's Funeral Home the sum of $15.00 for the installation of the single bronze marker, whereas it charges this plaintiff $43.60.

5. Roosevelt Memorial Park and Cemetery Corporation, like the other defendants, has rules and regulations requiring all markers to be installed by the cemetery, charge excessive fees for installation of said markers, try to discourage the sale of markers by the plaintiff and other monument dealers by taking an excessively long time in which to erect said markers. For example, this plaintiff sold a bronze marker for Bettie Ann Grimstead to be installed by Roosevelt Memorial Park and Cemetery Corporation, which took a long time to install the marker, and a representative of the plaintiff corporation had to bring to the attention of the President of Roosevelt Memorial Park and Cemetery Corporation that the bronze marker had not been installed, and, in addition, Roosevelt Memorial Park and Cemetery Corporation permitted nails to remain on the marker, and the nails were rusting it.

6. Veterans of the United States Government are buried in Roosevelt Memorial Park and Cemetery Corporation. The United States Government ships bronze markers from out of the State of Virginia to the Tidewater area to mark the final resting place of the veterans; all of which being in interstate commerce.

7. That even with the filing of this suit, Roosevelt is still attempting to discourage its lot owners from purchasing bronze markers from plaintiff. On April 24, 1966, plaintiff delivered to Roosevelt Memorial Park and Cemetery Corporation a bronze marker, and a check for the installation fee required by Roosevelt Memorial Park and Cemetery Corporation, to be placed on the grave of Garrett Williams, Sr., the said marker having been purchased from plaintiff by Marvenia T. Williams of this City. As of May 24, 1966, Roosevelt Memorial Park and Cemetery Corporation has failed to install said marker, and its Mr. Woodall told the purchaser that's what she got for buying from Norfolk Monument Company.

8. That many of the statements in the Amended Affidavit of Eugene P. Wadsworth are conclusions rather than facts.

/s/CHARLIE C. GREGORY

Subscribed and sworn to before me this 24th day of May, 1966.

/s/NANCY M. BROWN
Notary Public

HOWARD I. LEGUM
Fine, Fine, Legum, Schwan & Fine, p.q.
720 Law Building
Norfolk, Virginia
nmb

I hereby certify that true copies of the foregoing Affidavit of Charlie C. Gregory in Opposition to Amended Affidavit of Eugene P. Wadsworth were mailed to Messrs. Cooper, Spong & Davis, 403 Court

Street, Portsmouth, Virginia, counsel of record for defendant, Greenlawn Cemetery Park Corporation; Messrs. Kellam & Kellam, Board of Trade Building, Norfolk, Virginia, counsel of record for defendant, Woodlawn Memorial Gardens, Incorporated; Messrs. Worthington, White & Harper, One Main Plaza, Norfolk, Virginia, counsel of record for defendants, Rosewood Memorial Park, Incorporated and Princess Anne Memorial Park, Incorporated; Robert H. Patterson, Jr., Esquire, Mutual Building, Richmond, Virginia, counsel of record for defendants, Jas. H. Matthews & Co. of Virginia and Jas. H. Matthews & Co.; and to Bernard Glasser, Esquire, One Main Plaza, Norfolk, Virginia, counsel of record for defendant, Roosevelt Memorial Park and Cemetery Corporation, this 24th day of May, 1966.

/s/HOWARD I. LEGUM
Of Counsel

CIVIL ACTION NO. 5331
NORFOLK MONUMENT COMPANY, INC.,
Plaintiff,

v.

WOODLAWN MEMORIAL GARDENS, INCORPORATED, et als,
Defendants.

ORDER GRANTING SUMMARY JUDGMENT FOR ROOSEVELT MEMORIAL PARK AND CEMETERY CORPORATION

This cause came on this 27th day of October, 1966, to be heard upon the Amended Motion of Roosevelt Memorial Park and Cemetery Corporation filed May 3, 1966, to dismiss the plaintiff's action for its failure to state a claim upon which relief can be granted against the said Roosevelt Memorial Park and Cemetery Corporation, or, in the alternative, to grant summary judgment, and an Amended Affidavit in support thereof having been presented, and which said Motion is treated as a Motion for Summary Judgment, and the plaintiff having been given ample opportunity to present all material pertinent to such Motion,

And it appearing from the pleadings together with the Amended Affidavit of Eugene P. Wadsworth dated the 3rd day of May, 1966, and the counter-affidavit of Charlie C. Gregory (filed May 25, 1966), that the said defendant, Roosevelt Memorial Park and Cemetery Corporation, has not been guilty of the offenses charged in the Complaint, and that the plaintiff in its opposing Affidavit has set forth no specific facts

as required by Rule 56 (c) showing that there is a genuine issue for trial, as provided by Rule 56 of the Federal Rules of Civil Procedure, to support its conclusory and unsworn allegations, the Court is of the opinion that the defendant, Roosevelt Memorial Park and Cemetery Corporation, is entitled to a judgment as a matter of law.

WHEREFORE, the motion of the defendant, Roosevelt Memorial Park and Cemetery Corporation, for a Summary Judgment is hereby sustained, and judgment is granted in its favor.

At Norfolk, Virginia, on the
28th day of October, 1966.

WALTER E. HOFFMAN
United States District Judge

TESTIMONY OF CHARLIE C. GREGORY

(7/19/66 tr. 3)

CHARLIE C. GREGORY, having been first duly sworn, testified as follows:

(tr. 31)

BY MR. WHITE:

Q. At least one of the defendants denies that it ever purchased any bronze from Matthews.

A. I have heard that, yes, sir. I heard that they had denied that, yes, sir.

Q. Do you take exception to that denial?

A. No.

Q. You don't know any different, do you?

A. I would not say they are lying, no, sir.

Q. So would I be correct in saying that again your evidence of the conspiracy of these defendants to buy their exclusive requirements from Matthews is circumstantially based on the fact that you see a lot of Matthews' bronze in the cemeteries?

A. Yes, sir, that is correct.

Q. Do you deny that they all buy a substantial amount of bronze from Gorham?

A. Do I deny that?

Q. Yes.

A. No, I don't deny that.

* * * * *

(tr. 59)

BY MR. GLASSER:

Q. Mr. Gregory, what evidence do you have that Roosevelt combined and conspired or agreed directly or indirectly with James H. Matthews of Pennsylvania or of

(tr. 60)

Virginia to restrain or to monopolize the sale or distribution of burial markers in the cemetery?

A. Nothing in writing.

Q. Do you have any evidence?

A. No, sir, except as to circumstantial evidence.

Q. There is no evidence you can produce to the court that Roosevelt ever had any dealings with Matthews of Virginia or Pennsylvania, is there?

A. That is correct.

Q. When you set forth in your complaint that there are no grave markers installed in Roosevelt Memorial Park other than by Matthews, that is erroneous, is it not?

MR. LEGUM: Where are you reading from?

MR. GLASSER: No. 19.

MR. LEGUM: There is going to be added the word "substantially." I mentioned that.

MR. GLASSER: Let the witness testify if you will please, sir.

A. My answer would be "substantially," rather than saying that no markers were installed.

Q. Did you find any markers at all of Matthews installed in Roosevelt Memorial Park?

A. They appeared to be those of Matthews to me.

(tr. 61)

Q. What made them appear to be those of Matthews to you?

A. I was familiar with the product.

Q. Would it surprise you to learn that Roosevelt Memorial Park has never purchased the first bronze marker from Matthews?

A. It was a surprise when I read that.

Q. You are not in a position to dispute that, are you?

A. No, sir.

* * * * *

(tr. 66)

Q. Have you any evidence that they ever required of you the proof of the alloy content of your markers?

A. I don't know that I have anything in writing at all along that line from this particular park.

Q. Do you have any evidence that they ever required of you any alloy content?

A. I don't recall that they have ever brought that out.

RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE AS AMENDED

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, eff. March 19, 1948.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hear-

ing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall

be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. As amended Jan. 21, 1963, eff. July 1, 1963.

(f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

SHERMAN ACT PROVISIONS

Section 1 of the Sherman Act, 26 Stat. 209, 15 United States Code, Section 1, in pertinent part, reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

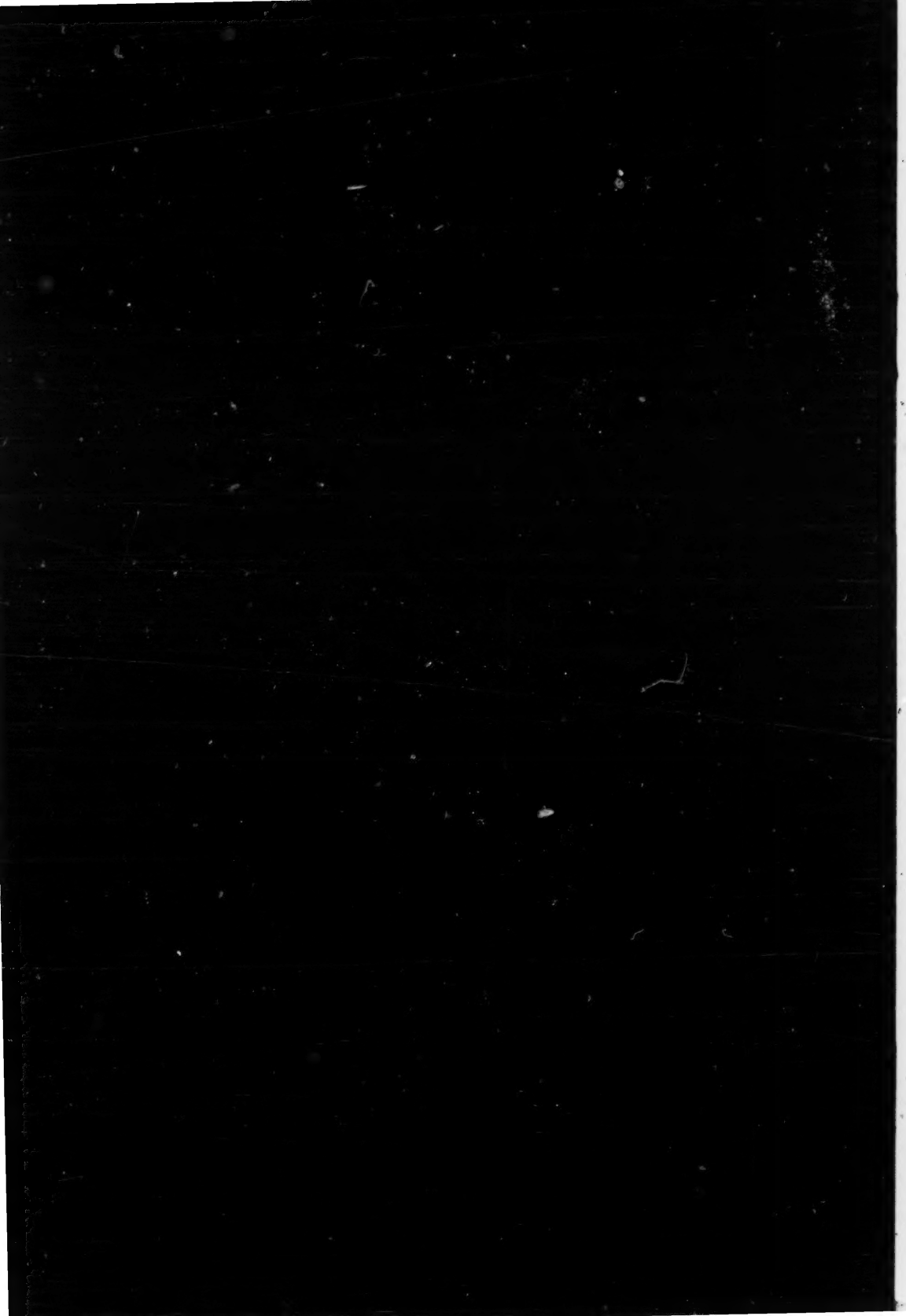
Section 2 of the Sherman Act, of 26 Stat. 209, 15 United States Code, Section 2, in pertinent part, reads as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, . . ."

28 U.S.C.A. 1257, STATE COURTS; APPEAL; CERTIORARI

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties of law of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.



IN THE

Supreme Court of the United States

No. 1040

NORFOLK MONUMENT COMPANY, INC.,
Petitioner,

V.

WOODLAWN MEMORIAL GARDENS, INCORPORATED,
ROSEWOOD MEMORIAL PARK, INCORPORATED,
GREENLAWN CEMETERY PARK CORPORATION,
ROOSEVELT MEMORIAL PARK AND CEMETERY CORPORATION,
PRINCESS ANNE MEMORIAL PARK, INCORPORATED,
JAS. H. MATTHEWS & CO. OF VIRGINIA,
and JAS. H. MATHEWS & CO.,
Respondents.

BRIEF OF ROSEWOOD MEMORIAL PARK, INCORPORATED, PRINCESS ANNE MEMORIAL PARK, INCORPORATED AND GREENLAWN CEMETERY PARK CORPORATION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COUR OF APPEALS FOR THE FOURTH CIRCUIT

QUESTIONS PRESENTED

The petition for a writ of certiorari has presented no questions for review of which this Court should take cognizance.

STATEMENT OF THE CASE

Certiorari is sought by the petitioner, plaintiff below, from the judgment of the Court of Appeals for the Fourth Circuit in affirming the action of the United States District Court for the Eastern District of Virginia in granting defendants' motion for summary judgment.

The facts of the case have been stated by the majority opinion of the Court of Appeals of the Fourth Circuit which appears as Appedix A of petitioner's brief, and the memorandum opinion of the Judge of the United States District Court, which appears as Appendix D of petitioner's brief.

ARGUMENT

This case has been carefully examined and analyzed by the United States District Court for the Eastern District of Virginia and by the United States Court of Appeals for the Fourth Circuit. Both Courts have found that no cause of action existed under the facts presented, though the plaintiff was ordered by the District Court to produce his case, and both Courts have held that the motions for summary judgment should be and were properly sustained.

The facts of the case have been adequately stated in the opinions of the District Court, found in Appendix D to the petitioner's brief, and the majority opinion of the Fourth Circuit Court of Appeals, found in Appendix A of the petitioner's brief. No purpose will be served by restating the facts here.

Suffice it to say that there has been sufficient attention and consideration given this case both by the

District Court and the Court of Appeals. While the petition for a writ of certiorari argues the merits of the case and the propriety of the motion for summary judgment, as it did twice before in the lower Courts, the petition is absolutely devoid of any reason why these decisions should be reviewed in the Supreme Court of the United States, other than the fact that they were adverse to the petitioner. Patently, this is not sufficient reason for review.

The petitioner has not brought itself within the purview of Sup. Ct. Rule 19, 28 U.S.C.A. While review on certiorari is discretionary, Sup. Ct. Rule 19 (b) outlines the considerations governing review on certiorari from a United States Court of Appeals. The decision of the United States Court of Appeals for the Fourth Circuit in this case is not in conflict with the decision of another Court of Appeals on the same matter; no important state or territorial decision is involved; no important question of federal law is involved which has not been but should be settled by this Court; the decisions of the lower Courts do not conflict with the applicable decisions of this Court, nor do they depart from the accepted and usual course of judicial proceedings. Thus the petitioner has not brought itself within the purview of Sup. Ct. Rule 19. Indeed the petition for a writ of certiorari does not suggest the contrary.

The most that can be said for this petitioner is that, having failed to prevail in two careful and thorough reviews by separate judicial forums, it now seeks review by a third hoping the latter will disagree with the former two. This is not sufficient ground for review and the writ of error should be denied.

CONCLUSION

This case presents no question for review and the writ should be denied.

Respectfully submitted,

/s/WILLIAM C. WORTHINGTON

/s/JEFFERSON B. BROWN

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the following by depositing a copy in the United States mail with first class postage prepaid addressed to each counsel of record at his office address:

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Richmond, Virginia
Attorneys for Jas. H. Matthews & Co. of Virginia and Jas. H. Matthews & Co.

on the 12th day of March, 1969.

/s/WILLIAM C. WORTHINGTON
/s/JEFFERSON B. BROWN

SUPREME COURT, U. S.

MAR 15 1969

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1968

No: 1040

NORFOLK MONUMENT COMPANY, INC.,
Petitioner,

v.

WOODLAWN MEMORIAL GARDENS, INCORPORATED, ROSEWOOD MEMORIAL PARK, INCORPORATED, GREENLAWN CEMETERY PARK CORPORATION, ROOSEVELT MEMORIAL PARK AND CEMETERY CORPORATION, PRINCESS ANNE MEMORIAL PARK, INCORPORATED, JAS. H. MATTHEWS & CO. OF VIRGINIA, and JAS. H. MATTHEWS & CO.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR JAS. H. MATTHEWS & CO. OF VIRGINIA AND JAS. H. MATTHEWS & CO. IN OPPOSITION

WILLIAM H. KING
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Supreme Court of the United States

October Term, 1968

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR JAS. H. MATTHEWS & CO. OF VIRGINIA AND JAS. H. MATTHEWS & CO. IN OPPOSITION

OPINIONS BELOW

The memorandum decision of the United States District Court for the Eastern District of Virginia, Norfolk Division, filed October 3, 1967 sustaining the respondents' motions for summary judgment, is reported at 290 F. Supp. 1 and 1968 Trade Cas. ¶ 72,661. This opinion appears at Pet. Cert. 30a and the Court's Order of November 14, 1967 at Pet. Cert. 29a.

The opinion of the United States Court of Appeals for the Fourth Circuit, affirming the District Court, was handed down November 14, 1968 and is reported at 404 F.2d 1008 and 1968 Trade Cas. ¶ 72,648.

STATUTES INVOLVED

Petitioner has cited all applicable statutes and rules (Pet. Cert. 3-4) except Rule 19, Rules of the Supreme Court of the United States:

> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (b) Where a court of appeals * * * has decided a federal question in a way in conflict with applicable decisions of this court;

and Rule 56(f), Fed. R. Civ. P., 28 U.S.C.:

> (f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

STATEMENT OF CASE

On December 16, 1965 Norfolk Monument Company, Inc. ("Norfolk") sued for an injunction and treble damages under both the Sherman and Clayton Acts alleging a conspiracy which injured Norfolk in the retail sales of bronze cemetery monuments. Respondent asked for damages accruing from 1960 (Tr., Vol. II, p. 59, hereinafter Vol. II, p. 59). Woodlawn Memorial Gardens, Inc., Rosewood Memorial Park, Inc., Greenlawn Cemetery Park Corporation, Roosevelt Memorial Park and Cemetery Corporation, and Princess Anne Memorial Park, Inc. ("Woodlawn", "Princess", "Rosewood", "Roosevelt", and "Greenlawn") were named co-defendants. Each of these respondents is a perpetual care cemetery which allows the erection of only bronze markers on concrete bases set flush to the ground. Also named as defendants were Jas. H.

Matthews & Company of Virginia ("Matthews of Virginia"), a maker of rubber stamps for stamping corrugated and paper boxes, and Jas. H. Matthews & Company, a Pennsylvaina corporation ("Matthews"), a manufacturer of bronze memorial plaques.

Petitioner alleged that respondents held meetings and conspired (a) to prevent the sales by petitioner of bronze markers in the respondent cemeteries, (b) to adhere to a policy of selling markers only to cemeteries, (c) to require that the cemeteries install, at exorbitant prices, markers not purchased from them, (d) to make unreasonable installation and perpetual care charges for markers purchased elsewhere, and (e) to advise respondent cemeteries as to the use of the rules and regulations governing their respective operations.

Discovery proceedings began immediately and continued for nine months. Respondents deposed petitioner's officers, and both petitioner and respondents secured full production of all opposing parties' written records relevant to the issues. Petitioner propounded interrogatories which respondents answered in full, but petitioner did not depose any of respondents' officers or employees.

At the end of discovery procedures, petitioner's only substantial complaints were:

> (a) Respondent cemeteries charge from 10 cents per square inch plus $10 to $175 per marker for installation and perpetual care of markers which were not purchased from the cemeteries, whereas the installation and perpetual care charges of the markers sold by the cemeteries were included in the sale prices of the markers; and
>
> (b) Respondent cemeteries refused to permit petitioner and others similarly situated to install markers sold by them on the grounds of respondent cemeteries.

Following Norfolk's admission that it could produce no other evidence of a conspiracy, the District Court granted respondents' motions for summary judgment and entered an order dismissing the suit with prejudice. The Fourth Circuit Court of Appeals affirmed, 2-1.

CLARIFICATION OF PETITIONER'S STATEMENT OF CASE

In order to clarify ambiguities in petitioner's Statement of Case (Pet. Cert. 5-9) respondent has juxtaposed some of petitioner's questionable statements against the text of the record from which they apparently derived.

Petitioner's Statement of Case	Record
"The fees charged by Rosewood Memorial Park, Incorporated and Princess Anne Memorial Park, Incorporated for installing single and double bronze markers are identical * * *." Page 6.	"Princess Anne and Rosewood are owned, operated and controlled by the same stockholders and directors." (Brief for Appellant, p. 5, *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens*, 404 F.2d 1008, 1968 Trade Cas. ¶ 72,648. Also, Vol. III, p. 48)
"Respondents adopt a remarkably uniform practice of charging prohibitive installation fees to permit the use of an outsider's grave marker * * *." Page 5.	In 1966 respondents charged prices ranging from 10 cents per square inch for installation and $10 per marker for perpetual care (Roosevelt) to $175 per marker regardless of size (Woodlawn). (Vol. II, pp. 38-39 and 43-45 and Vol. I, p. 125) For a standard marker (24 x 14), these charges were from $43.60 (Roosevelt) to $175 (Woodlawn); for a double marker (44 x 14) they were $71.60 to $175. Greenlawn, the only cemetery to itemize costs to those who purchased markers from it, charged the same installation and perpetual care fee of all lot owners, regardless of from whom the memorial was purchased. (Answer to Interrogatory 7, at Vol. I, p. 131) The dissenting Judge gave the price spread as $67.20 to $175 (single) and $123.20 to $175 (double) (Pet. Cert. 17a), apparently adopting petitioner's "FACTS," set out on page 6 of its brief before the Fourth Circuit. Respondents can find no record support for the $67.20 and $123.20 amounts for Roosevelt. Moreover, both petitioner's president (Vol. II, pp. 38-

"All of the memorial parks require a specific alloy content in the bronze markers installed, and reserve the right to reject non-conforming markers. The alloy content requirement is the same as markers manufactured by Jas. H. Matthews & Co. * * *." Page 6.

39 and 43-45) and Roosevelt's answer to Interrogatory No. 6 (Vol. I, p. 125) set the price at 10 cents per square inch plus $10 per marker, or $43.60 for a standard (24 x 14) marker and $71.60 for a double (44 x 14) marker.

This same alloy content is used by both Gorham Company, a major competitor (Vol. I, pp. 124-133, 136, 141 and 147-48), and Meierjohan-Wengler, Inc., petitioner's supplier. (Vol. III, pp. 54-55 and 75 and letter from H. Meierjohan, President of Meierjohan-Wengler, Inc. to Norfolk Monument Company, dated December 11, 1963, produced in Gregory's discovery Exhibit (d) # 312 at Vol. II, p. 52)

> Q This analysis contained the same percentages that almost all of these companies adhere to; is that right?
>
> A I don't know about what all of the other companies adhere to, but I know that the company I buy from meets the requirements.
>
> Q Mier, Johan-Wengler (sic), is that the company that you have reference to?
>
> A Yes.
>
> Q Do they conform to the same requirements, the same alloy content?
>
> A Yes, sir, or better.
>
> [Vol. III, pp. 52-53 (deposition of C. C. Gregory, petitioner's president)]

Petitioner earlier cited two consent decrees entered against memorial gardens, *Booth* v. *Jas. H. Matthews*, Civ.A. No. 60-418 (W.D.Pa., 1963) and *Kaeppler* v. *Jas. H. Matthews*, Civ.A. No. 25618 (E.D.Pa., 1963). Both decrees, at § V(B)(1), allow defendant cemeteries to require similar alloy content.

"Matthews, in its pamphlet, 'Modern Cemeteries,' suggests a number of practices, which in effect erect competitive barriers to retailers other than the cemeteries themselves." Page 6.

Below are excerpts from page 11 of the pamphlet "Modern Cemeteries" produced at Vol. I, p. 167 and enclosed in a separate envelope attached thereto:

"Jas. H. Matthews & Co. is not permitted to make recommendations regarding Rules and Regulations concerning quality of memorials or the installation thereof."

* * *

"The question of cost of maintenance of memorials is of great importance to the lot owner and the cemetery. These charges must be realistic in the light of future costs and they can best be determined by consultation with your accountant. Give your accountant a list of the maintenance duties that you perform and have him compute the amount you need to have invested in an Irrevocable Memorial Care Fund Trust to produce sufficient income to defray those expenses. This charge is probably more equitable if applied to the square inch area of the memorial and **the same basis of charge should be assessed against every memorial regardless of who sells the memorial to the lot owner.**" (Emphasis in original)

"[T]he record shows a jury could find that the respondents were mutually aware of the others' restrictive practices." Page 9.

Respondents find nothing in the record indicating mutual knowledge of the parties. Only petitioner's Interrogatory No. 3(g) is even marginally relevant, and all respondents denied joint meetings under oath. (Vol. I, pp. 124, 130, 136, 141, 147, 153 & 155). Petitioner made no attempt to discover, by interrogatories or depositions, whether respondent cemeteries knew of the others' practices or whether they had the opportunity to know. Moreover, respondent cemeteries are scattered throughout the cities of Norfolk, Virginia Beach and Chesapeake. (Brief for Appellant, p. 4, *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens*, 404 F.2d 1008).

"This is at least the fourth time Matthews has been named co-defendant with memorial parks in anti-trust actions attacking the same practices. Each of the previous actions * * * was settled by a consent decree enjoining the specific practices complained of in this case." Pages 6 and 7.

1. *United States* v. *Jas. H. Matthews & Co.*, 1958 Trade Cas. ¶ 69,187 (W.D. Pa. 1958). The consent decree forbids practices herein complained of: "Making any suggestion or recommendation to any cemetery the purpose or effect of which, is, or may be to eliminate or restrict sales, by any person, of bronze markers for installation in such cemetery;" § V(D), *supra*, page 74,641. No memorial parks were named co-defendants.

2. *Booth* v. *Jas. H. Matthews & Co.*, No. 60-418 Civ. (W.D.Pa. 1963). Dismissed as to Matthews, with prejudice. Defendant cemeteries allowed to establish bronze alloy standards and require certificates of compliance. § V(B)(1) Cemeteries were allowed to charge installation and perpetual care fees and to do all installation, so long as standards and charges were uniformly applied. §§ V(A)(2) and (3), (B)(2) and VI.

3. *Kaeppler* v. *Matthews*, No. 25618 Civ. (E.D.Pa. 1963). Disposition and decree identical to *Boothe, supra*.

4. *Norfolk Monument Company* v. *Woodlawn Memorial Gardens*, 290 F.Supp. 1 (E.D.Va. 1968). Summary judgment entered for all defendants.

"There is direct evidence of frequent conferences between the memorial parks and representatives of respondent Matthews." Page 9

"There is evidence of numerous visits to and conferences with the memorial parks by sales representatives of Matthews." Page 6.

Q I gather from your earlier testimony that you have no evidence other than circumstantial concerning any meetings between Matthews and the other defendants?

A That is correct.

[Vol. III, pp. 75-76 (deposition of C. C. Gregory, petitioner's president). See, also, Vol. III, pp. 37, 53-54 and 59-60]

Petitioner's evidence of "numerous visits" apparently came from respondent's answers to Interrogatory 8. Below are representative answers:

> Representatives from all of the bronze manufacturers call on us periodically, including James H. Matthews & Company. [Greenlawn; Vol. I, p. 131]
>
> Someone from Jas. H. Matthews & Co. called on Roosevelt for the purpose of selling bronze grave markers, but the date and name of such individual is not recollected. [Roosevelt; Vol. I, p. 126]
>
> Woodlawn made no purchases from or through Mr. Clouser [Matthews' local representative], and neither solicited nor received any assistance from him. All dealings with James H. Matthews & Co. were handled by correspondence with its main office, in the form of orders. Woodlawn's contacts with Mr. Clouser were rare, and were not on a regular basis. [Woodlawn; Vol. I, p. 137]

See, also, the remaining answers at Vol. I, pp. 142, 148 and 153-157.

I.

The Cases Cited By Petitioner In Support Of His Petition For Writ Of Certiorari Are Inapplicable To This Case.

This case raises the question of whether illegal horizontal and vertical conspiracies can be inferred from (1) a common practice of refusing to allow third parties to install grave markers, (2) widely varying installation prices, (3) an advertising booklet openly circulated but alleged to be the "hub of the conspiracy," and (4) unchallenged affidavits denying all allegations of conspiracy.

For a case in this posture, petitioner's cases are inapplicable. In *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464 (1962), the defendant CBS used its great economic power to acquire for one-half million dollars a local UHF television station which it promptly removed from the air along with several other UHF stations elsewhere. This Court held that a jury could properly infer that CBS's closing down a recently acquired UHF station, apparently against its self-interest, marked an illegal conspiracy to destroy UHF broadcasting. The closing of stations and agreements with co-defendants were proved, and only an improper motive remained to be inferred.

In *Interstate Circuit* v. *United States,* 306 U.S. 208 (1939), the plaintiff introduced an express invitation from a dominant group of film exhibitors to the dominant group of distributors to grant film clearances detrimental to competing exhibitors. Granting such clearances would have been inimical to the self-interest of one film distributor acting alone and could not have been maintained. This Court held that the uniform granting of identical clearances by the invitees allowed the inference of an improper motive. Subsequently, this Court rejected *Interstate Circuit's* loose language relied on by petitioner. *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.,* 346 U.S. 537, 540-41 (1953). See Handler, *Anti-Trust—New Frontiers and New Perplexities,* 2 The Record of the Association of the Bar of the City of New York 59, 66-67 (1951) and Sorkin, *Conscious Parallelism,* 2 Antitrust Bulletin 281 (1957).

In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U.S.

211 (1951), the plaintiff introduced a letter by co-defendant Calvert that it had "to go along with Seagram." Plaintiff further proved that prior to this letter, defendants Seagram and Calvert held joint meetings and subsequent to the letter charged liquor wholesalers "identical terms."

In *Eastern States Retail Lumber Dealers' Ass'n.* v. *United States,* 234 U.S. 600 (1914), the instrument of the conspiracy—systematically circulated trade reports naming wholesalers who sold in competition with association members—was introduced into evidence. Other evidence indicated that these reports encouraged retailer boycotts of named wholesalers—acts which in the absence of a conspiracy would be contrary to the retailer's self-interest.

Although petitioner contended in its complaint that the instruments of a conspiracy existed, it refused to utilize the full opportunity for discovery provided by Rules 26-37 and 56(f), Fed. R. Civ. P., 28 U.S.C., and consequently has been unable to produce witnesses, letters, agreements, correspondence or any other testimonials to a conspiracy among the several defendants. See, *Gold Fuel Service, Inc.* v. *Esso Standard Oil Co.,* 306 F.2d 61, 64 (3rd Cir. 1962), *cert. den.,* 371 U.S. 951 (1963). Nor has petitioner shown, as did the successful plaintiffs in the above cases, that the acts he complains of are inimical to respondents' apparent self-interest.

Petitioner's cases are inapplicable when petitioner has no proof of agreements among respondents. Moreover, both the District Court and the Circuit Court below were aware of the Court's admonition of caution in *Poller,* and the Court of Appeals cited *Poller* in its opinion. *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens,* 404 F.2d 1008, 1011. This Court has recently added that *Poller* should not be read as prohibiting summary judgments in conspiracy cases. *First National Bank of Arizona* v. *Cities Service Co.,* ..... U.S. .....; 36 L.W. 4394 (1968).

Petitioner has failed to show that the Courts below have decided a "federal question in a way in conflict with an applicable decision of this court * * *." Rule 19, Rules of the Supreme Court. Therefore, there are no "special and important reasons" for issuing a writ of certiorari.

II.

Petitioner Introduced No Evidence Which Raises A Question Of Material Fact Connecting Matthews Of Virginia To The Alleged Conspiracies.

Petitioner's complaint alleged that Matthews of Virginia sold bronze cemetery markers and participated in a conspiracy restraining trade therein. In both its answer and the affidavit of T. J. Mier, its President, Matthews of Virginia affirmed that it

> does not now, and has never, engaged in the sale, manufacture or distribution of bronze products (including bronze memorials or bronze grave markers); (ii) it was engaged in the manufacture of dyes, rubber stamps, inks, seals and other products for marking on paper and corrugated boxes; (iii) its operations were entirely separate and unrelated to the bronze operations of the defendant Jas. H. Matthews & Co.; * * * [Vol. I, p. 153; see, also, Vol. I, pp. 83-88 and 237-39]

Petitioner's President, Charlie C. Gregory, was asked the following question on deposition:

> Mr. Gregory, in the bill of complaint you allege that both Matthews of Pennsylvania and Matthews of Virginia, two separate corporations, "are engaged in the manufacture and sale of bronze grave markers." Do you have any evidence at all of any nature that Matthews of Virginia is in fact engaged, or was engaged, in the manufacture and sale of bronze grave markers?
>
> A. No, sir.
>
> [Vol. III, pp. 68-69]

Following that exchange Matthews of Virginia submitted an affidavit specifically denying any part in the alleged conspiracy. (Vol. I, pp. 237-39) Not one of petitioner's several subsequent affidavits made reference to the part played by Matthews of Virginia in the conspiracy. (e.g., Vol. I, pp. 264-281)

Under Rule 56(e), Fed. R. Civ. P., 28 U.S.C., after the facts alleged in the complaint have been specifically denied under oath, the adverse party may not rest upon its pleadings in opposing a motion for summary judgment.

Norfolk has rested upon the allegations of its pleadings and has not set forth "specific facts showing that there is a genuine issue for trial." Under the mandate of Rule 56(e) "if he does not so respond, summary judgment, if appropriate, shall be entered against him." Since there is no genuine issue of material fact indicating that Matthews of Virginia sold or manufactured bronze markers or in any way participated in the alleged conspiracies, the motion for summary judgment should be sustained. *Peller* v. *International Boxing Club,* 135 F.Supp. 942 (N.D. Ill. 1955), *aff'd.* 227 F.2d 593 (7th Cir. 1955) and Craven, J., dissenting in *Norfolk Monument Company, Inc.* v. *Woodlawn Memorial Gardens, et al,* 404 F.2d 1008, 1019.

III.

There Is No Evidence In The Record Which Supports An Inference Of Horizontal Conspiracies Among Respondent Cemeteries

Petitioner alleges that record evidence allows the inference of horizontal conspiracies among respondent cemeteries. Yet, petitioner can only point to parallel prices, the parallel refusal of respondents to allow third parties to install markers and mutual knowledge of these practices.

A. As the former Assistant Attorney General in charge of Antitrust pointed out, absent a showing of contrary self-interest "conscious parallelism is meaningless * * * ." Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal,* 75 Harv. L. Rev. 655, 681 (1962). The Attorney General's National Committee to Study the Antitrust Laws concurred:

> "Conscious parallelism" is not a blanket equivalent of conspiracy. Its probative value in establishing the ultimate fact of conspiracy will vary case by case. Proof of agreement, express or implied, is still indispensable to the establishment of a conspiracy under the antitrust laws.

Report 39 (1955). Accord, ABA, *Antitrust Developments: 1955-1968* 22-24 (1968).

Both courts and economists have agreed with Judge Yankwich:

> The act of each, no matter how independently taken, may have a striking similarity, for the very obvious reason that the measures taken are *the only ones* which commend themselves in the circumstances. [*United States* v. *Twentieth Century-Fox Film Corp.*, 137 F.Supp. 78, 93 (S.D.Calif. 1956)].

For the economists' position, see Chamberlin, *The Theory of Monopolistic Competition* 31 (6th ed. 1950) and Kaysen, *Collusion Under the Sherman Act,* 65 Q.J.Econ. 263 (1951).

Conscious parallelism is legally irrelevant unless supported by either proof of an express agreement or a showing that the parallel acts are contrary to the parties' apparent self-interest. *American Tobacco Co.* v. *United States,* 328 U.S. 781, 803-04 (1946), *Milgram* v. *Loew's Inc.,* 192 F.2d 579, 583 (3rd Cir. 1951), *cert. den.* 343 U.S. 929 (1952), *Interstate Circuit* v. *United States,* 306 U.S. 208, 222-223 (1939) and Turner, *supra,* at 677-678.

B. Petitioner has no evidence of meetings among respondent cemeteries. Nor has he attempted to test their denials by cross-examination. Further, there is no evidence that the respondents knew of the practices of others.

Petitioner contends that respondents' refusal to allow third parties to install markers proves the conspiracy. But there is a very apparent business reason—the need for uniformity in the cemeteries. Even petitioner's president recognizes this need. (Vol. III, p. 43) And the consent decrees petitioner cited allowed cemeteries to reserve the right to standardize and install markers. *Booth* v. *Matthews, supra,* and *Kaeppler* v. *Matthews, supra,* at § V(A)(2) and (B).

Petitioner contends that installation charges are too high, but this does not prove conspiracy. See, generally, Chamberlin, *The Theory of Monopolistic Competition* and Robinson, *The Economics of Imperfect Competition* (1933). Moreover, petitioner asserts that installation costs are only $3.00. Yet petitioner fails to mention the cost of labor. Petitioner's casual attitude toward installation (Vol. III, pp. 46-48) should be contrasted with the care which Greenlawn takes:

1. Oiling and preparing markers for foundation base.

2. Making form and pouring foundation consisting of 5 to 6 in. of concrete, reinforced.
3. Removing form, transporting to and from grave site, excavating foundation and setting pre-poured marker.
4. Returning to marker and raising two to three times, depending on grave settlement. [Vol. I, p. 131]

Respondents must care for the markers in perpetuity. Thus they must charge and invest enough to produce a yearly income sufficient to pay for this extra care which includes:

1. Cleaning memorial periodically, usually every two to three weeks.
2. Trimming around memorial by hand during the growing season every 10 to 15 days. The type of grasses used are of the fast growing variety (Bermuda or Wild grass) specifically (sic) of which would grow completely across a marker in this period of time. [Vol. I, p. 131]

Not all graves have markers, so the price of the site pays only for perpetual care of the grave. It is more difficult to mow a grave with a marker, and a considerable amount of hand trimming is required. Even if this cost only $4.00 more per year, this cost, capitalized at a 4% rate, would dictate a trust fund of $100 per marker.

Petitioner charges that prices ranging from $43.60 to $175 for single markers and $71.60 to $175 for double markers are "remarkably uniform." These prices, respectively, have a mean distribution of 48.5 and 40.5. The average prices are $97 and $140. A standard deviation which ranges from 50 to 35 per cent of the average price indicates an unusually wide price distribution and is in no sense "remarkably uniform."*

* This was computed by treating Rosewood and Princess Anne as one unit and assuming a frequency of 1 for the prices. See, Freund and Williams, *Modern Business Statistics* 84-90 (1958) and Hoel, *Introduction to Mathematical Statistics* Ch. 4 (2d ed. 1954).

Finally, there is no uniformity in the way respondents compute their charges. Roosevelt charges ten cents a square inch installation charge and $10 per marker for perpetual care. Greenlawn charges twelve cents per square inch installation and fourteen cents per square inch perpetual care. Woodlawn charges $175 for installation and perpetual care, regardless of size. Princess Anne and Rosewood have identical charges, but they are jointly owned and operated.

C. The present posture of this case is similar to *Gold Fuel Service, Inc.* v. *Esso Standard Oil Co.*, 195 F. Supp. 85 (D.N.J., 1961), *aff'd.* 306 F.2d 61 (3rd Cir. 1962), *cert. den.* 371 U.S. 951 (1963) and should be similarly treated. The District Court granted sumary judgment in a Section 1 Sherman Act proceeding in which the plaintiff introduced evidence of similar bids for an oil supply contract. The Court of Appeals pointed out that consciously parallel acts do not alone "supply a sufficient basis for submitting the question of preconcert to the jury." 306 F.2d at 64. The Court quoted plaintiff's admission "that it [plaintiff] had no evidence except the fact of low and ultimately identical bidding by several producers to support its claim for conspiracy." In affirming summary judgment, Judge Hastie sumarized:

> [W]e think the plaintiff has given no indication that it could show a basis for a logical inference of preconcert predicated on conscious parallelism. This omission is fatal to the plaintiff's case even before trial, at least where uncontradicted affidavits and other documentary material submitted on motion for summary judgment, if true, provide a conclusive negation of the generally pleaded conspiracy claim, and plaintiff has failed to take advantage of ample opportunity by discovery or otherwise to contradict defendant's showing. [306 F.2d at 64]

IV.

Petitioner Has Failed To Introduce Evidence Or Submit Affidavits Sufficient Under Rule 56(e) To Establish A Vertical Conspiracy Among Matthews And Respondent Cemeteries.

Petitioner asserts that three facts indicate that Matthews is part of the conspiracy. These are Matthews' admission that it mailed an advertising booklet, "Modern Cemeteries," to many cemeteries.

Petitioner asserts that these booklets formed the basis of the horizontal conspiracies among the cemeteries. Petitioner also argues that Matthews encouraged the cemeteries to require that markers be made of the bronze alloy which Matthews uses. Finally, petitioner found "direct evidence" of frequent meetings among respondents.

In light of the record, these charges are absurd. First, Matthews, admits that it distributed the booklet "Modern Cemeteries," but the trial Judge described it as only "a form book." 290 F. Supp. at 3. Nevertheless, petitioner asserts that this booklet is the hub of a conspiracy and the equivalent of a joint invitation to conspire. Cf. *Interstate Circuit* v. *United States,* 306 U.S. 208 (1939). Yet Norfolk apparently considered the booklet so insignificant that it did not print it in its appendix or quote offending provisions in its brief. At several places, this booklet contained the following warning:

> IMPORTANT NOTICE
>
> Under the decrees entered into by Jas. H. Matthews & Co., in the Anti-Trust case brought against it by the United States Government, Matthews is not permitted to recommend or suggest Rules & Regulations for Cemeteries regarding the quality, specifications, costs of installation, and foundation of memorials. [Page 17 of "Modern Cemeteries" produced at Vol. I, p. 167]

Even the most vivid imagination could not convert this into *Interstate Circuit's* joint invitation to conspire. This booklet falls short of the standards of proof of vertical conspiracies which this Court applied in *White Motor Company* v. *United States,* 372 U.S. 253 (1963) and *United States* v. *General Motors,* 384 U.S. 127 (1966). Nor does Matthews have the power to impose its regulations. (Vol. III, p. 77) Matthews distributed "Modern Cemeteries" in 1959, subsequent to the entry of the 1958 anti-trust consent decree, *United States* v. *Jas. H. Matthews,* 1958 Trade Cas. ¶ 69,187 (W.D.Pa. 1958). If the booklet were so ominous as petitioner alleges, this surely would have been called to the attention of the District Court and Matthews long ago would have been charged with criminal contempt.

Second, petitioner complains of the respondent cemeteries' requirement that all markers have a certain alloy content. Since this is the alloy content used by Matth[illegible] petitioner contends that this is proof of a conspiracy. Yet both [illegible]han-Wengler, petitioner's supplier, and Gorham Company, [illegible]awn's chief supplier, use that same alloy. Moreover, in cases cited by petitioner, defendant cemeteries were allowed to require proof that outside markers were made of that alloy. *Booth* v. *Matthews* and *Kaeppler* v. *Matthews, supra*, at § V(B)(1). The proper inference is not that there is a conspiracy, but that the particular alloy required by the respondent cemeteries is best for perpetual care markers.

Third, petitioner implies that there were frequent clandestine meetings between respondent Matthews and the cemeteries. The only evidence of such meetings, however, is found in respondents' answers to petitioner's Interrogatory No. 8. Respondents' answers reflect the obvious: Matthews is a manufacturer and distributor of bronze markers; respondent cemeteries purchase and sell markers. To sell its products, Matthews must solicit sales. To infer a conspiracy from these solicitations is to make every manufacturer and wholesaler completely vulnerable to anti-trust strike suits alleging conspiracy.

The undisputed facts in the record show that there is no uniformity in Matthews' relations with respondent cemeteries. Roosevelt has never purchased a Matthews' marker. (Vol. I, p. 124) Greenlawn, in each year 1961, 1962, 1963 and 1964, purchased more markers from Gorham Company than it purchased from Matthews in the entire period 1960 through 1965. (Vol. I, p. 130) The respondent cemeteries purchased less than 50% of their requirements from Matthews in the period for which damages are asked. (Vol. I, pp. 124-58)

Little additional comment need be made to the strange alchemy which can transmute occasional salesmen's calls, an advertising booklet, and industry-wide use of a common bronze alloy into insidious vertical and horizontal conspiracies violating both the anti-trust laws and consent decrees.

V.

Summary

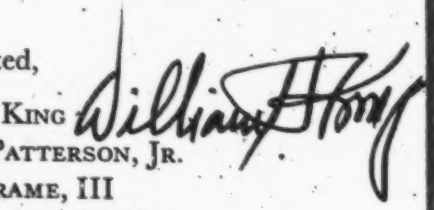
We can offer no more concise summary than that of the District Court:

> The plaintiff knows of no meetings between the parties; the plaintiff argues that the book "Modern Cemeteries,—Recommendations for their Attorneys" prepared and distributed by Jas. H. Matthews & Co. of Pennsylvania in the interest of management and executives of the Modern Cemetery Industry, admittedly containing many suggestions picked up and inculcated into some of the defendant cemeteries' printed matters, is a hub of the conspiracy. Not so—the booklet itself an Exhibit, could only be described as a form book. It specifically points out on page 5, that it contains suggested standards of fair and reasonable regulations which the cemetery would be advised to adopt but says that "* * * Jas. H. Matthews & Co. is not permitted to make recommendations and suggests that the reader consult his own attorney".
>
> The plaintiff has been required, under proper appropriate motions, to produce his case. He has said in depositions that he has no evidence other than that proffered. Clearly, the evidence fails to state a case under the Sherman Act.
>
> To put these parties to trial runs full face into the intent and purpose of Rule 56 of the Federal Rules of Civil Procedure. There not only is no genuine issue of material fact of conspiracy, there simply is no evidence of conspiracy at all and the plaintiff has said he could produce nothing more. [290 F. Supp. at 3-4]

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that Norfolk's petition is without merit, that the District Court correctly found that there was no material issue of fact, and that the Court of Appeals for the Fourth Circuit properly affirmed the judgment of the District Court.

Respectfully submitted,



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IN THE

Supreme Court of The United States

No. 1040

NORFOLK MONUMENT COMPANY, INC.,
Petitioner,

v.

WOODLAWN MEMORIAL GARDENS, INCORPORATED,
ROSEWOOD MEMORIAL PARK, INCORPORATED,
GREENLAWN CEMETERY PARK CORPORATION,
PRINCESS ANNE MEMORIAL PARK, INCORPORATED,
ROOSEVELT MEMORIAL PARK AND CEMETERY CORPORATION,
JAS. H. MATTHEWS & CO. OF VIRGINIA, and
JAS. H. MATTHEWS & CO.,
Respondents.

BRIEF OF WOODLAWN MEMORIAL GARDENS, INCORPORATED IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

QUESTIONS PRESENTED

The only question presented by the petition for a writ of certiorari is whether the respondents' motions for summary judgment should have been granted.

STATEMENT OF THE CASE

Certiorari is sought by the petitioner, plaintiff below, to review the judgment of the Court of Appeals of the Fourth Circuit in affirming the action of the United States District Court for the Eastern District of Virginia in granting the respondents' motions for summary judgment.

The facts of the case have been stated in the majority opinion of the Court of Appeals for the Fourth Circuit which appears as Appendix A in the petitioner's brief, and in the memorandum opinion of the United States District Court which appears as Appendix D thereto.

ARGUMENT

After the petitioner had completed its pretrial discovery and so advised the District Court, Woodlawn and the other respondents moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (28 U.S.C.). All the evidence was carefully examined and analyzed by the Court and it found no genuine issue of material fact to submit to a jury. Indeed, as stated in the Court's memorandum, " * * * (T)here is no evidence of conspiracy at all and the plaintiff has said he could produce nothing more." The respondents' motions were granted and the petitioner appealed. The Fourth Circuit Court of Appeals again reviewed the evidence and affirmed the judgment of the District Court.

The petitioner now asks a third court to review its case, claiming the lower courts' decisions conflict with those of this Court. It quotes passages from *Poller* v.

Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S. Ct. 486, 7 L.Ed. 2d 458; *Interstate Circuit* v. *United States,* 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610; *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U.S. 211, 71 S. Ct. 259, 95 L.Ed. 219, and *Eastern States Retail Lumber Dealers' Ass'n* v. *U.S.,* 234 U.S. 600, 34 S. Ct. 951, 58 L.Ed. 1490, to the effect that direct proof of conspiracy is unnecessary and that summary judgment should not be granted in doubtful cases. A review of the decisions quoted from shows that sufficient evidence was adduced in each case to support an inference of conspiracy. Here the record is completely devoid of evidence of conspiracy, and to put the respondents to trial would run full face into the intent and purpose of Rule 56.

Essentially what the petitioner is asking this Court to do is to write Rule 56 off the books and permit it to go to trial upon merely the allegations in its bill of complaint and the affidavits in opposition to the motions for summary judgment. It makes the same argument, in effect, as that considered by this Court in *First National Bank of Arizona* v. *Cities Service Co.,* 391 U.S. 253, 88 S. Ct. 1575, ... L.Ed. 2d ..... (1968), in which the plaintiff contended that in an antitrust case the burden of proof of non-participation in the alleged conspiracy is on the defendant, and that the lower court erred in granting summary judgment. In rejecting this contention the Court said (at 88 S. Ct. 1593):

> "Essentially all that the lower courts held in this case was that Rule 56(e) placed upon Waldron the burden of producing evidence of the conspiracy he alleged only after respondent Cities Service conclusively showed that the facts upon

which he relied to support his allegations were not susceptible of the interpretation which he sought to give them. That holding was correct. To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support these allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend these rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint."

All the evidence adduced in some nine months of discovery proceedings, and all the contentions made in the petitioner's brief have been carefully considered by the District Court and the Fourth Circuit Court of Appeals. Neither court found any significant probative evidence tending to support the complaint. The petitioner's president advised the District Court that it had no other evidence of conspiracy. Its sole hope of success is apparently based upon the possibility that something favorable will develop at a trial on the merits. Rule 56 was adopted for the express purpose of disposing summarily of cases based upon hopes rather than facts.

There is no conflict between the decision of the Fourth Circuit Court of Appeals in this case and the decisions of this Court. The cases cited in the petitioner's brief do not support its position, and the petitioner has not brought itself within the purview of Supreme Court Rule 19 (28 U.S.C.). While review on certiorari is discretionary with the Court, writs are ordinarily granted only when there are special and important reasons therefor. There is nothing special or important in this suit, and even if it went to trial it would be susceptible to a motion for a directed verdict pursuant to Rule 50, F.R.C.P. (28 U.S.C.), at the conclusion of the plaintiff's case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the writ of certiorari requested should be denied.

Respectfully submitted,

/s/FREDERICK S. ALBRINK,
Counsel for Woodlawn Memorial Gardens, Incorporated

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by depositing a copy in the United States mail with first class postage annexed to the envelope addressed to each counsel of record at his office address:

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on the 11th day of April, 1969.

/s/FREDERICK S. ALBRINK

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

NORFOLK MONUMENT COMPANY, INC. *v.* WOODLAWN MEMORIAL GARDENS, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 1040. Decided April 21, 1969.

PER CURIAM.

The petitioner, a retailer of burial monuments and bronze grave markers, brought this action for damages and injunctive relief under §§ 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15, 26, alleging that the respondents had violated §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1, 2, by conspiring to monopolize and monopolizing the manufacture and sale of bronze grave markers. The respondents—Matthews, a manufacturer of such markers, and five operators of cemeteries (called "memorial parks") that sell the markers—were charged with having jointly adopted various restrictive devices to prevent, restrict, and discourage sales of markers by the petitioner for installation in the cemeteries. After extensive pretrial discovery, the District Court granted the respondents' motion for summary judgment, concluding that there was no material issue of fact and no evidence of conspiracy. 290 F. Supp. 1. The Court of Appeals affirmed. 404 F. 2d 1008.

We cannot agree that on the record before the District Court a jury could not have found that the respondents had conspired to exclude the petitioner from and monopolize the market for bronze grave markers. As Circuit Judge Craven pointed out in his dissenting opinion, the record disclosed the following conduct on the part of the respondents:

"(1) Despite the unskilled nature of the work, all of the memorial parks refuse to permit the

plaintiff to install markers sold by it; all of them insist that the work be done by the cemeteries themselves.

"(2) None of the memorial parks charges lot owners a separate installation fee in the case of markers purchased from the cemeteries.

"(3) All of the memorial parks require the payment of an installation fee by the plaintiff for installing markers purchased from the plaintiff. The plaintiff plausibly maintains that the actual cost of installation comes to about $3. Yet, enormous installation fees are charged plaintiff . . . .

"(4) All of the memorial parks require a specific alloy content in the bronze markers installed, and reserve the right to reject non-conforming markers. The alloy content requirement happens to be the same as manufacturer Matthews' markers and the same as is implicitly suggested in a pamphlet ('Modern Cemeteries') distributed by Matthews to its customers. All of the memorial parks except Roosevelt are customers of Matthews.

"(5) There is evidence that Greenlawn, Woodlawn and Princess Anne have attempted to dissuade lot owners from purchasing markers from the plaintiff. The affidavit of plaintiff's president states that numerous other incidents of this nature have occurred.

"(6) Defendant Matthews, in its pamphlet 'Modern Cemeteries,' suggests a number of practices which in effect erect competitive barriers to retailers other than the cemeteries themselves.

"(7) Many of these practices have been adopted by the memorial park defendants, as evidenced by affidavits in the record, and by the 'rule books' of Rosewood, Princess Anne and Greenlawn.

"(8) There is evidence of numerous visits to and conferences with the memorial parks by sales representatives of Matthews." 404 F. 2d, at 1012–1014.

The District Court found that the rules relating to the alloy content and installation of the markers were reasonable "[i]n view of the continuing obligation of perpetual care imposed upon the cemeteries, in its contracts with lot owners . . . ." 290 F. Supp., at 3. But the business justification for these restrictive rules was disputed by the petitioner, who proffered evidence that the markers required very little permanent care and that, in any event, the funds for that purpose were already provided from another source. The reasonableness of the rules was a material question of fact whose resolution was the function of the jury and not of the court on a motion for summary judgment. The same is true of the inferences to be drawn from respondent Matthews' pamphlet. The District Court dismissed it as without any possible significance because it was a mere "form book," which "specifically points out . . . that it contains suggested standards of fair and reasonable regulations which the cemetery would be advised to adopt but says that '. . . Jas. H. Matthews & Co. is not permitted to make recommendations and suggests that the reader consult his own attorney.'" * 290 F. Supp., at 3. Again this self-serving disclaimer raised a question for the jury, and it surely did not alone conclusively rebut the petitioner's contention that the pamphlet evidenced an agreement among the respondents to participate in the alleged restrictive practices.

Nor do the other findings of the District Court necessarily dispel the inferences which the jury would be asked by the petitioner to draw. The District Court found, for example, that there was "a wide divergence of prices" charged for installation "which would com-

*Judge Craven noted that the reason for the disclaimer is that "Matthews is under an injunction prohibiting it from making any suggestions to memorial parks as to the quality of markers installed in the parks." 404 F. 2d, at 1013, n. 6. The injunction was entered in one of the three consent decrees which have settled prior antitrust actions against Matthews. See 404 F. 2d, at 1014.

pletely negative any systematic scheming or conscious parallelism." 290 F. Supp., at 3. The petitioner's complaint, however, was not that the respondent cemeteries were charging uniform fees but that they were charging deliberately "excessive and unreasonable" fees for the purpose of injuring the petitioner. The fact that the District Court appeared to consider dispositive of the conspiracy allegations was that the petitioner's principal officer "admitted that he has no letters, agreements, correspondence, or any other testimonials to a conspiracy among the several defendants . . . ." 290 F. Supp., at 2. But it is settled that "[n]o formal agreement is necessary to constitute an unlawful conspiracy," *American Tobacco Co.* v. *United States*, 328 U. S. 781, 809, and that "business behaviour is admissible circumstantial evidence from which the fact finder may infer agreement." *Theatre Enterprises, Inc* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 540.

We express no opinion, of course, on the strength or weakness of the petitioner's case, but hold only that the alleged conspiracy had not been conclusively disproved by pretrial discovery and that there remained material issues of fact which could only be resolved by the jury after a plenary trial. As we have cautioned before, "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller* v. *Columbia Broadcasting System*, 368 U. S. 464, 473.

The writ of certiorari is granted. The judgment is reversed, and the case is remanded for further proceedings in the District Court consistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, MR. JUSTICE FORTAS, and MR. JUSTICE MARSHALL are of the opinion that certiorari should be denied.